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CASES ON THE LAW OF PROPERTY

VOLUME 5

WILLS, DESCENT, AND ADMINISTRATION

BY

GEORGE P. COSTIGAN, JR.

PROFESSOR OF LAW IN NORTHWESTERN UNIVERSITY

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

ST. PAUL

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1910

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THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

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the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

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Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Joshua R. Clark, Jr., Assistant Professor of Law, George Washington University. *Subject, Mortgages.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., July, 1910.

Following are the books of the Series now published, or in press:

Administrative Law
Bills and Notes
Carriers
Conflict of Laws
Criminal Law
Criminal Procedure
Damages
Partnership
Suretyship
Trusts
Wills and Administration

PREFACE

When this casebook was begun, it was expected that it would cover wills and administration only. It was soon found, however, that by teaching tradition in this country, as well as on principle, the subject of Descent was so closely bound up with Wills and Administration that it ought to be included with them. The book was therefore extended in number of pages to include cases on descent, and the title was accordingly expanded to read, Cases on Wills, Descent, and Administration. The inclusion of these three subjects in one volume is justified by Abbott's Cases on Descent, Wills, and Administration and by Volume IV of Gray's Cases on Property.

The compiler of a casebook on such a widely varied subject-matter as Wills, Descent, and Administration finds not the least of his tasks that of exclusion. He cannot begin to put in everything that he would like, yet, so far as his number of pages allows, he must leave out nothing that teachers of the subject would want included. Moreover, he must endeavor to give properly proportioned space to the various topics treated, knowing full well that he cannot hope to please all critics. The effort of the compiler has been to give to each topic only that space which its intrinsic difficulty or the variety of decisions upon it seemed to demand. Throughout the work the need of offering a choice of material for teachers to select from has been kept in mind.

Of the 290 principal cases in this collection, 103 are English and Irish. To the 187 American cases the different jurisdictions have contributed as follows: Delaware, Indiana, North Dakota, Oregon, and Utah, 1 case each; Kentucky, Mississippi, South Carolina, Texas, and Virginia, 2 cases each; Alabama, Arkansas, Kansas, Nebraska, Ohio, Vermont, and Wisconsin, 3 cases each; Iowa, Maryland, and the federal courts (counted as one jurisdiction), 4 cases each; New Hampshire, 5 cases; California, Connecticut, Maine, and Missouri, 6 cases each; Georgia, Michigan, and Minnesota, 7 cases each; New Jersey and North Carolina, 8 cases each; Rhode Island, 9 cases; Pennsylvania, 11 cases; New York, 13 cases; Illinois, 16 cases; and Massachusetts, 24 cases. While the geographical distribution of cases selected for a book of this character is largely accidental, it is believed that the actual territorial apportionment is unusually good.

Certain cases necessarily find a place in any collection of decisions on the subject, and the judgment of previous compilers as to leading cases has not been lightly disregarded. Indebtedness must be ac-

knowledged to Professor Abbott's Cases on Descent, Wills, and Administration, to Professor Mechem's Cases on Succession, and to Professor Gray's Cases on Property.

A word should be said about the footnotes added by the compiler. On the subject of footnotes great differences of opinion will be found among law school teachers. Some prefer practically no footnotes; others want what is in effect a treatise in the form of footnotes; still others favor various intermediate kinds of footnotes. In this particular casebook the footnotes will be found to represent an intermediate variety. They make no attempt to collect and marshal all the decisions on a given point, but very frequently refer to readily available compilations of such decisions. They do seek, however, to indicate conflicts of authority on given points, where such conflicts are not made plain by the cases given in the text, and frequent quotations are made in them for the elucidation or refutation of points covered by cases found in the text. The importance of serviceable footnotes has been kept constantly in mind by the compiler.

In order to make readily available the quotations placed by the compiler in the text and in the footnotes the cases quoted from are included in the table of cases. About 225 cases are thus listed, and their geographical apportionment happens to be much the same as that of the principal cases.

To facilitate reference to the statutes, sections of the English statutes have been printed in the book at what seemed appropriate places for their convenient use; but those sections are also given or referred to in the Appendix, which contains a reasonably full collection of the English statutes.

GEO. P. COSTIGAN, JR.

CHICAGO, ILLINOIS, May 5, 1910.

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(c) [illegible] U.S.

Feudal system never recognised as part of common law of U.S. Hence no effect on lease power in U.S.

Stats in general are based on Eng legislation

Chapter III Pa 9. Sec.

Sec. 2 Civ. Code 1273

" 3 671

" 4 appeal Code 173 - 4 + 5

" 5 170 Cal. 668

174 " 663

106 " 643

128 " 57

130 " 360

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CASES ON WILLS, DESCENT AND ADMINISTRATION

PART I

LAST WILLS AND TESTAMENTS

CHAPTER I

DEFINITIONS

PAGE'S DEFINITIONS

"Will."—The word "will," in the popular meaning of the term, is a disposition, made by a competent testator in the form prescribed by law, of property over which he has legal power of disposition, which disposition is of such nature as to take effect at the death of the testator.[1]

1 "A more generally received definition is as follows: 'A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life.' 1 Jarman on Wills, p. *18. This definition is inadequate. It describes some wills, and wills with which books on that subject commonly deal. But it does not describe all wills. A will is not always an instrument; it may be oral or nuncupative. A will may make no disposition of property. An instrument, duly executed, and which merely appoints an executor, without directions as to what he shall do, is a valid will, as is also an instrument by which a father appoints a guardian for his minor child, the appointment to take effect upon the death of the father." Gardner on Wills, p. 2.

But a so-called will, even though it is admitted to probate, may be one only by courtesy. Compare the case where the executor and everybody provided for in the will predeceased the maker of the will, where the will was admitted to probate, and yet where the so-called testator was held to have died "intestate" within the meaning of an act giving an intestate's widow £500 out of his estate. In re Cuffe, [1908] 2 Ch. 500.

On the validity of a will making no disposition of property, see 89 Am. St Rep. 487, note.

In its technical and historical sense, however, a "will" is an instrument of the type described which disposes of realty only.

"Testament."—An instrument which disposes of personalty only is called a "testament," and an instrument disposing of both realty and personalty is known as a "will and testament."

The popular meaning of "will" has so far encroached upon the technical meaning that "will" is used indiscriminately of instruments passing realty or personalty or both. "Testament," however, is almost never used of an instrument passing realty only.

"Testator."—The word "testator" is very commonly used of the person making either a will or a testament.

"Devisor."—"Devisor" is, according to derivation, the correct term for one who makes a will, but, while used, is not common.

"Devisee," on the other hand, is the word regularly used to denote one to whom realty passes by will.

"Legatee," is properly used to denote one to whom personalty passes by will.

"Legatee" and "devisee" are frequently interchanged in popular usage, however.

"Devise" and *"bequeath."*—Of the verbs used to denote the act of making a will, "devise" is properly used of realty, and "bequeath" of personalty.

"Devise."—Of the nouns used to name the various forms of gift, "devise" is used of a gift of realty.

"Legacy."—"Legacy" is used as a gift of a sum of money.

"Bequest."—"Bequest" is used of a gift of personalty in general.

None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy.

A "devise" is often miscalled a "bequest," or "bequest" is often used to include both realty and personalty, or is used of a gift of money alone.

So the verb "devise" is often used to refer to personalty alone.

Page on Wills, § 2.

CHAPTER II

HISTORY OF THE LAW OF WILLS AND OF TESTAMENTS

LEAKE ON DISPOSITION BY WILL

Land Not Devisable at Common Law, Except by Special Custom.—The feudal principles of the common law did not admit of a disposition by will of land of freehold tenure. Upon the death of the tenant his heir was originally entitled by the terms of the grant; and though afterwards the title of the heir became liable to be defeated by an alienation of the ancestor during life, it was never defeasible at common law by a devise or testamentary disposition at death. Land was devisable by will in some places by special custom, as lands of gavelkind tenure in the county of Kent, land in the city of London, and in some boroughs, which customs are supposed to be relics of the earlier and præ-feudal common law.

Uses in Equity Devisable, Until the Statutes of Uses.—Under the system of uses, to be noticed presently, the use or beneficial interest in the land, as recognized in the Court of Chancery, became disposable by will; and a testamentary disposition of land might be effected by conveying it to be held to the uses to be declared by will. The Statute of Uses, 27 Hen. VIII [1535], by the conversion of uses into legal estates, took away this capacity of testamentary disposition; but, probably for that reason, it was soon followed by the Statutes of Wills, conferring a direct testamentary power over the legal estate.

Statutes of Wills.—These statutes, 32 Hen. VIII [1540] c. 1, and 34 & 35 Hen. VIII [1542] c. 5, empowered a tenant in fee simple to give, dispose, will, or devise to any person or persons, by his last will and testament in writing, all his manors, lands, tenements, rents, and hereditaments, or any of them, "at his own free will and pleasure." The power was expressly restricted, as to lands held by the tenure of knight's service, to the extent of two-thirds of such lands only. But the statute, 12 Car. II [1660] c. 24, which afterwards converted the tenure of knight service into socage tenure, abolished this restriction, and rendered all lands of freehold tenure uniformly disposable by will.

Statute of Frauds, as to the Form of Wills.—The Statute of Frauds, 29 Car. II [1676] c. 3, § 5, further regulated the form of wills of lands, by enacting (section 5) "that all devises and bequests of any lands or tenements devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some

other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect." Section 6 prescribed the modes by which devises might be revoked.

THE WILLS ACT (1 Vict. [1837] c. 26).—The above enactments were all repealed by the last Wills Act, 7 Wm. IV & 1 Vict. [1837] c. 26, § 2, except as to wills made before 1838 (section 34); and under this statute the power to dispose of real estate by will now subsists, and the mode of exercising it is regulated.

DISPOSITION BY WILL—HOW FAR SUBJECT TO THE RULES OF THE COMMON LAW.—A disposition by will, equally with a disposition by deed, is subject to the general rules of the common law regulating the estates or interests which may be given. A testator can only devise such estates as are known to the law, nor can he alter or take away the legal incidents and qualities of such estates; for instance, he cannot render estates of inheritance inalienable, nor alter the law of inheritance.

HOW FAR INDEPENDENT OF RULES OF LAW.—But the power of disposition by will, being derived directly from the statute, is for the most part independent of the restrictions imposed by the peculiar feudal doctrines of the common law, and by the common-law forms of conveyance. Devises of freehold estates were operative without livery of seisin, and without attornment, before these formalities were dispensed with by statute.

DEVISES OF FUTURE ESTATES.—Devises of freehold estates may be made to take effect in futuro, at a future date or upon any specified event, leaving the inheritance in the meantime to descend to the heir, or such devises may be made to take effect in defeasance of and in substitution for preceding devises, although such limitations of estates are contrary to the rules of the common law, which admit no future limitations or substitutions of the tenancy, except by way of remainders. These future devises are analogous to the springing and shifting uses which became legal limitations under the Statute of Uses, and they are called distinctively executory devises.

Leake's Digest of the Law of Property in Land (1st Ed.) pt. I, chap. 1, section IV, § 2, pp. 66–69.

DIGBY ON THE HISTORY OF THE LAW OF WILLS OF LAND

It has been seen that one of the most marked effects of the growth of feudalism was the abolition, except in certain localities, of the practice of devising interests in lands by will. Such a disposition would have defeated the most valuable rights of the lord—relief, wardship,

and marriage. It was therefore wholly inconsistent with feudal theories. In a great many boroughs, and in gavelkind lands, local customs were sufficiently strong to preserve the ancient liberty of disposition by will, and cases relating to "burgages devisable" are common in the Year Books.

It has also been seen how the practice of disposing of uses of land by will became prevalent under the protection and encouragement of the Chancellors. One of the earliest of the recorded cases on this branch of the law contains a disposition by will, or rather perhaps settlement, of the use of lands made in the sixth year of Richard II. Except, therefore, in the case of burgages devisable, a devise, before the legislation presently to be noticed, was simply a declaration by the legal tenant of the uses to which his heir at his death should hold the lands, or of the uses to which he had conveyed the lands to feoffees (such conveyance having been expressed to be to the use of his will), or else a disposition of a use which had already been created in favor of himself.

In order, therefore, that the devisee of the use might enforce the disposition of the will, the aid of the Chancellor was called in. The Chancellor could compel, if necessary, the tenant of the legal estate to convey the land devised to cestui que use, the devisee.

It appears from the title and preamble of the Statute of Uses that one of its principal objects was to abolish the power of disposing of interests in lands by will, and thereby to restore to the king and the great lords the feudal dues which they could not claim if the estate of the heir were defeated by a devise.

The Statute of Uses contained a saving in favor of wills made before the 1st day of May, 1536, the year following that of the passing of the statute. Between that time and July 20, 1540, the power of testation was, as regards freehold interests in lands, wholly abolished, except in the localities mentioned above. It may, however, be well believed that it was impossible for the legislature, arbitrary and thorough-going as it was, to maintain a restriction so opposed to the habits and practices which had prevailed throughout the country ever since uses had been understood and protected by the Chancellor. Accordingly, in the thirty-second year of Henry VIII (1540), it was found necessary to restore a large measure of the power of devising interests in lands. The provisions of the Statute 32 Henry VIII, c. 1, are somewhat complicated; but the upshot of them is that power is given to every tenant in fee simple to dispose of all his lands held by socage tenure, and of two-thirds of his lands held by knight-service. Careful provision is made by this statute for the saving of primer seisins, reliefs, and fines on alienation, in the case of socage lands, and of the rights of wardship over the third part of knight-service lands, in favor of the king or other lord.

When by the act for the abolition of military tenures, tenure by knight-service was converted into free and common socage, the power

of devise granted by the Statutes of Henry VIII extended to the whole of the lands of which previously only two parts had been devisable.

Digby's History of the Law of Real Property (5th Ed.) 377–379.

PAGE ON THE HISTORY OF TESTAMENTS OF PERSONAL PROPERTY

§ 17. Testaments in Pre-Norman Times.—The testament passing personal property has a less complicated history.

In pre-Norman times the power to dispose of personal property by testament was firmly established. It is not clear whether this power applied to the whole of testator's personal property, or to a part only.

§ 18. Doctrine of Reasonable Parts.—By Glanvil's time (A. D. 1187) it was settled that the power of disposing of personal property by testament had limits in some cases. If the testator left neither wife nor children, he could dispose of all of his personal property by testament; but if he left either wife or children, he could dispose of one-half of his personal property by testament, the other half going to the surviving wife or children, as the case might be; while if he left both wife and children, he could dispose of but a third of his personal property (known as the "dead's part"). One-third of his personal property (known as the "wife's part") went to his wife; the remaining third (known as "child's part" or "bairn's part") going to the children.

There has been some dispute whether the rules above stated were the common law of England or only local customs. The weight of authority is that they were the common law of England, and were in force in Glanvil's day over the whole of England.

§ 19. Power of Testator to Dispose of His Entire Personal Property.—This rule ceased to be the law in a great part of England so gradually that Blackstone says that it is impossible to trace out when first this alteration began, and so thoroughly that it was possible with some show of truth to deny that it ever had been the law. It was established by the reign of Charles I (1625–1649) that the general rule in England was that testator could dispose by testament of any or all of his personal property, except where the relics of the old law still lingered, under the name of local custom, as in Yorkshire and London. These so-called local customs were one by one uprooted by Parliament in a series of repealing statutes, and finally the general statute, 1 Vict. c. 26 (1837), gave the testator the general power of disposing of the whole of his personal property.

§ 157. History of the Law of the Extrinsic Elements of Wills.— * * * Testaments were governed by the ecclesiastical law. Originally the ecclesiastical courts enforced even the oral wishes of the decedent; but in course of time oral wishes were enforced

only in certain specified cases. The testament, except in the cases where a nuncupative will was enforced, was required to be in writing. No further formalities were required. If testator assented to the instrument, it was not necessary that he sign it, or that it be subscribed by attesting witnesses. It was not necessary that the testament be a holograph; that is, in testator's handwriting. An unsigned paper, not in testator's handwriting, and not signed by him, could be probated as his testament, if the evidence showed that he intended it as his testament.

The Statute of Frauds, already quoted, did not affect testaments. The danger of fraud, in the informal instruments which were upheld by the courts, became so evident that statutes were passed in England in the first half of the nineteenth century (1 Vict. c. 26, sec. 9), and in the different states of this country at different dates, imposing upon testaments of personalty substantially the formalities required to a will of lands.[1] The original freedom of wills and testaments from set formalities persisted longer as to testaments of personalty than as to wills of realty. Indeed, in some jurisdictions testaments of personalty are still less formal instruments than wills.

Page on Wills, §§ 17, 18, 19, 157.

PAGE ON WILLS AND TESTAMENTS IN THE UNITED STATES

§ 20. HISTORY OF THE LAW OF WILLS AND TESTAMENTS IN THE UNITED STATES.—The English colonists who settled the Atlantic coast of what is now the United States in the seventeenth century brought with them the common law of England as modified by the Statute of Wills. Accordingly, where not expressly limited by local statute, the power of a testator to dispose of his realty, as well as his personalty, by last will and testament, has always been recognized in the courts of the United States. Not only was American law from the first held to be modified by the Statute of Wills, but the feudal system was never generally held to be a part of our law as being unsuited to our institutions. The law of wills in the United States is thus based upon English law, and continuous with it in such states as were founded by the English.

1 "In England, prior to the statute of Victoria, wills of personal estate were not required to be attested or signed by the testator, and drafts of wills, or written memoranda, made by or for the testator, were admitted to probate in the ecclesiastical courts as valid written wills, not nuncupative. By that statute, and by statutes in the various states of the Union, wills of real and personal property were placed on the same footing as regards the formalities of their execution and attestation." 1 Underhill on the Law of Wills, § 175, p. 241, note 5.

In the South and West of the United States, however, the original European stock was not English, but French and Spanish. In these sections, therefore, marked traces of Roman law, as modified by the French and Spanish, are to be found. Louisiana has put into statutory form the French law, which in turn was based upon the Roman. In California and some of the territories adjoining on the southeast the law of wills is in part of Spanish origin. From these states statutes have been adopted in some other states.

The net result may be said to be that in the greater part of the United States the law of wills is of pure English origin, modified by modern statutes, showing some influence of Spanish and French law in some of the Southern and Western states; while in Louisiana the law of wills is of French-Roman origin, gradually yielding in some respect to the influence of the remaining common-law states.

Page on Wills, § 20.

CHAPTER III

TESTAMENTARY CAPACITY AND INTENT

SECTION 1.—INFANCY

"And be it further enacted that no will made by any person under the age of twenty-one years shall be valid."—Wills Act, 7 Wm. IV & 1 Vict. c. 26, § 7 (1837).

"It is not questioned that, by the Act of 1840, a person under the age of twenty-one, is incapable of making a will. Hartley's Dig. art. 3252. If, therefore, the testator was a minor, as alleged, the will was void for the want of capacity to make it."—Wheeler, C. J., in Moore v. Moore, 23 Tex. 637, 638 (1859).[1]

SECTION 2.—COVERTURE

"At common law, a married woman could not devise real estate, and was incapable of disposing of her chattels by will, without the consent of her husband."—Stoutenburgh v. Hopkins, 43 N. J. Eq. 577, 579, 12 Atl. 689, 690 (1887).[2]

[1] "Lord Coke [Co. Lit. 89b, note 83] lays it down as an established rule of the common law that an infant of eighteen may execute a valid will of personalty, though no infant under the age of twenty-one had capacity to devise lands. [See St. 34 & 35 Hen. VIII, c. 5, § 14.] But the rules which were recognized in the English ecclesiastical courts, where wills of personal property were probated, were different. The rule of the civil law that infants who had attained the age of fourteen, if males, and twelve, if females, had capacity to execute wills of personal property, was adopted in these courts. The judgment of the probate court admitting the will to probate being conclusive as to the capacity of the testator, the rule of the civil law was agreed to, if not affirmed, by the courts of common law and in the jurisdiction of the chancellor." 1 Underhill on the Law of Wills, 170, § 120. Local statutes should be consulted.

[2] On the effect of coverture on testamentary capacity at common law, see 1 Jarman on Wills, *39–42, and 57 Am. Dec. 340–349, note. Local statutes should be consulted. On the right of a wife, under a statute removing the disabilities of married women, to devise property held by her husband and herself as joint tenants, see 7 L. R. A. (N. S.) 701, note. As late as 1899 the Idaho statutes were construed to empower married women to make witnessed wills, but not unwitnessed holographic wills. Scott v. Harkness, 6 Idaho, 736, 59 Pac. 556 (1899).

SECTION 3.—ALIENAGE

"Aliens are capable of acquiring, holding, and transmitting movable property, in like manner as our own citizens, and they can bring suits for the recovery and protection of that property."—2 Kent's Com. *62.

"Johnson could and did, although an alien, acquire an estate in fee in the lots, by the conveyances of White and McDowell, subject only to be divested by the government upon office found. * * *

"Aliens, in by purchase, must be deemed citizens in any controversy with other citizens. It is the sovereign power only where the real estate is situated that has the right to disturb the alien in his title and possession; it is a mere matter of policy that the government may oust him, pertaining solely to the state, over which the citizen has not, nor ought he to have, any control.

"Whatever title Johnson acquired to the lots by purchase, the better opinion seems to be he could convey by deed or will, and that his devisees took the same estate he had."

Catron, J., in Williams v. Wilson, Mart. & Y. (Tenn.) 248, 253, 254 (1827).[3]

SECTION 4.—CONVICTION OF CRIME

RANKIN'S HEIRS v. RANKIN'S EX'RS.

(Court of Appeals of Kentucky, 1828. 6 T. B. Mon. 531, 17 Am. Dec. 161.)

OWSLEY, J.[4] Reuben Rankin was charged with the murder of John Blake, and was indicted for the offense, put upon his trial, found guilty by the verdict of a jury, and sentenced to be hung by the judgment of the court.

Between the time when the sentence of condemnation was pronounced, and the period fixed by the court for his execution, Rankin

[3] See 1 Jarman on Wills, *44.

"An alien may acquire lands by purchase, but not by descent; and there is no distinction, whether the purchase be by grant or by devise. In either event, the estate vests in the alien as a defeasible estate, subject to escheat at the suit of the government. He has complete dominion over the estate of which he is thus seized, until office found. * * * The ancient rule of the common law was that an alien could not maintain a real action for the recovery of lands, but he might, in such action, defend his title against all persons but the sovereign. It has been held, however, in North Carolina, if not in other states of the Union, that he may maintain ejectment." Judge, J., in Harley v. State, 40 Ala. 689, 695 (1867).

[4] Part of the opinion is omitted.

departed this life, having previous to his death, but after sentence, in due and legal form, made and published his last will and testament in writing, by which he disposed of all his estate. The will was afterward presented to the county court of Bourbon for probate, by the executors therein named, and, though contested by the heirs of Rankin, it was proved and admitted to record.

The heirs, being dissatisfied with the decision of the county court, have brought the case before this court for revision.

The execution of the will, by the testator, in legal form, is not contested by the heirs, nor do they pretend that he was not, at the date of the will, of sane mind; but it is argued by their counsel that after the testator was convicted of the murder charged against him he was *civiliter mortuus,* and therefore incapable of making a valid will. * * *

In England, where attainder or conviction of felony works, not only corruption of blood, but also a forfeiture of the lands and goods of the offender, authority is not wanting to prove the incompetency of the attainted or convicted person to make a will; but, upon adverting to those authorities, it will be found that the incompetency of the attainted or convicted person to do so results exclusively from the forfeiture, which by the laws of that country follows the attainder, or conviction, as an inseparable consequence, and from the incapacity of the person attainted, or convicted, afterwards to hold any estate except for the use and benefit of the king.

Thus in Shepherd's Touchstone, p. 404, it is said: "A traitor attainted from the time of a treason committed, can make no testament of his lands or goods, for they are all forfeited to the king, but after the time he hath a pardon from the king for his offenses, he may make a testament of his lands or goods as another man. A man that is attainted, or convicted of felony, cannot make a testament of his lands or goods, for they are forfeited; but if a man be only indicted, and die before attainder, his testament is good for his lands and goods both. And if he be indicted, and will not answer upon his arraignment, but standeth mute, etc., in this case, his lands are not forfeited, and therefore it seems he may make a testament of them."

The same doctrine is to be found in Swinb. part 11, § 13, and in Bacon's Ab. title "Wills and Testaments," letter B. And Bacon further adds: "That however the wills of traitors, aliens, felons and outlawed persons are void as to the king or lord, that has right to the lands or goods by forfeiture or otherwise; yet the will is good against the testator himself, and all others, but such persons only."

If, therefore, the reason and doctrine of the law be correctly laid down by these authors, it will be perceived that the validity or invalidity of the will, which was made by Rankin, must depend upon the question whether or not, by the laws of this country, he forfeited the whole of his estate, upon being convicted of the murder of Blake. If, on the conviction, the whole of his estate was forfeited, there re-

mained nothing which he could transmit by will to others, and of course, according to the authorities cited, his will must be held void and inoperative. But if, notwithstanding the conviction, there was not an entire forfeiture of all his estate, according to the same authorities, he was capable of disposing of the interest not forfeited, and as to that interest, be it what it may, his will can have an operation, and must be adjudged valid. * * *

It was, therefore, not the absolute fee-simple estate of the offender in lands and goods that, according to the Constitution, was forfeited to the commonwealth on attainder, or conviction of felony; but it was the interest or estate, which the offender was entitled to during his life only, that by the laws in force at the passage of the act was forfeited. The reversionary interest, or, in other words, that part of the estate which remained after the death of the offender, according to those laws, resided in him after conviction, and, since the passage of the act, must, we apprehend, still be understood to continue to reside in the offender, though attainted or convicted.

It results, therefore, that, notwithstanding Rankin's conviction of the murder of Blake, he retained a reversionary interest in all the lands and personal estate owned by him at the time of conviction; so that on account of any forfeiture of his estate he cannot, according to the authorities cited, be deemed incompetent to dispose of the interest not forfeited, and still possessed by him. Nor is there anything in the nature or character of that interest which forbids its being disposed of by will. The Constitution, as well as the act of 1796, had both declared that no conviction of felony should work corruption of blood. There was, therefore, nothing either in the sentence of condemnation against Rankin, or in the nature of the interest in reversion held by him, which would have prevented that interest from descending and passing to his legal representatives, provided he had died intestate; and the rule is well settled, that whatever is descendable is also devisable by will.

It is, therefore, the opinion of a majority of the court, the CHIEF JUSTICE dissenting, that, notwithstanding the conviction of Rankin, he was capable of making a will, and that the county court was correct in admitting it to record.

The order of that court must, consequently, be affirmed with cost.[5]

[5] See 1 Jarman on Wills, *45. Local statutes should be consulted. The Rhode Island statute prohibits a convict from making a will or conveyance during his imprisonment. Gen. Laws R. I. 1909, p. 1309, § 53.

SECTION 5.—MENTAL CAPACITY

SLAUGHTER v. HEATH.

(Supreme Court of Georgia, 1907. 127 Ga. 747, 57 S. E. 69.)

LUMPKIN, J.[6] 1–3. The motion for a new trial contained 22 grounds. It was granted on 5 of them. The others were overruled. Both sides excepted. It was a second grant of a new trial. Several of the grounds are based on refusals to charge as requested, to the effect that, in order to destroy testamentary capacity, there must be "a total deprivation of reason"; that to bring about that result the testator must be non compos mentis, and that the law defines a person non compos mentis to be "one wholly deficient in understanding, or who by grief, sickness, or other accident has wholly lost his understanding"; that he must be "totally deprived of his reason"; and that, "if his mind was not totally eclipsed or entirely extinguished, he had sufficient capacity to make a will." Did the presiding judge err in refusing to give these requests in charge?

Various attempts have been made to establish some arbitrary test of testamentary capacity; but they have each had to be abandoned or modified as new combinations of facts arose in later cases. At an early date the English courts entertained the view that it was not required that one should be mentally perfectly sound in order to make a will, and that a delusion not of a kind to affect the will would not render it invalid. Dew v. Clarke, 5 Russ. 163. Then they seemed to incline to a narrower view. Waring v. Waring, 6 Moore, P. C. 341, 12 Jur. 947; Smith v. Tebbitt, 16 L. T. R. 841. Then they returned to their original position that testamentary capacity was not the same thing as perfect sanity. Banks v. Goodfellow, 39 L. J. Q. B. 237, 22 L. T. 813, L. R. 5 Q. B. 549; Smee v. Smee, L. R. 5, P. D. 84, 49 L. J. P. 8; Goods of Bailey, 31 L. J. P. 178, 4 L. T. 477; Murfett v. Smith, 57 L. T. 498. The American courts have generally held that perfect mental soundness did not furnish the test, but that there may be partial insanity, disconnected from and not affecting the making of the will, which would not render it invalid.

It has sometimes been sought to apply the same test as in criminal cases. But this will clearly not answer, since "criminal capacity involves primarily the ability to distinguish right from wrong; while testamentary capacity involves the ability to understand the estate to be disposed of, the proper objects of bounty, and the nature of the testamentary act." Page on Wills, pp. 108–111, § 94 et seq.[7] It has

[6] Part only of the opinion is given.

[7] But see State v. Jones, 50 N. H. 369, 9 Am. Rep. 242 (1871), and Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193 (1886), on the true test of criminal capacity. See, also, 63 Am. St. Rep. 79–108, note.

been sometimes sought to compare capacity to contract with that to make a will. But the making of a contract with another party, where there is a consideration, a meeting of minds, an agreement to do or not to do some one or more things, may evidently involve a different amount of mental capacity from the making of a will, where the owner of property directs how it shall go after his death. Besides, it will be found that the courts have not always agreed in defining contractual capacity. Page on Wills, § 96; Gardner on Wills, 106. In some states there are statutes along this line. Our own Code declares: "An incapacity to contract may coexist with a capacity to make a will." Civ. Code 1895, § 3268. It has been said in an early authority: "So, also, an idiot—i. e., such a one as cannot number 20, or tell what age he is, or the like—cannot make a testament or dispose of his lands or goods; and, albeit he do make a wise, reasonable, and sensible testament, yet is the testament void. But such a one as is of a mean understanding only, that hath grossum caput, and is of the middle sort between a wise man and a fool, is not prohibited to make a testament." 2 Shep. Touch. 402. Sometimes it has been added, in defining or describing an idiot: One who does not know his own mother and father, or cannot tell the days of the week, and the like. 1 Hale, P. C. 29; Swinb. pt. 2, § 4. Obviously, however, these are purely arbitrary tests. All of us have most likely seen persons who did not know their ages, or who from illiteracy were unable to count, but who were far from being idiots or imbeciles. And, on the other hand, Prof. Gardner, in his work on Wills (page 112), has said that: "Doubtless a person who, with opportunities for learning these facts, does not acquire them, is an idiot; but an ability to do and tell these simple things would not convincingly prove that the person so capable was not still an idiot."

The mind grades up from zero to the intellectual boiling point so gradually that dogmatic tests are of little value. What is needed is a sensible, practical test, intelligible to a jury. Rejecting any arbitrary tests, and looking at the mental capacity necessary in the light of the thing to be done, viz., the making of a will, the courts now have generally reached a fairly uniform definition of testamentary capacity, in the absence of special statutes. It is thus stated in Gardner on Wills, p. 100, § 31: "A testator has a sound mind, for testamentary purposes, only when he can understand and carry in mind, in a general way, the nature and situation of his property, and his relations to the persons around him, to those who naturally have some claim to his remembrance, and to those in whom and the things in which he has been chiefly interested. He must understand the act which he is doing, and the relation in which he stands to the objects of his bounty and to those who ought to be in his mind on the occasion of making his will." In Page on Wills, p. 114, § 97, the rule is similarly, though more briefly, stated. See numerous cases cited in those text-books, and 1 Jarman on Wills (5 Am. Ed.) 94, in note B. In Rood on Wills, § 111, a like rule is laid down, and it is added: "The essential matter is power to

remember. Failure in fact to remember all these elements does not make the will void." See, also, Underhill on Wills, § 87, and citations. In Stancell v. Kenan, 33 Ga. 56, 68, this court announced substantially the same rule, and recommended the following, or something like it, as a charge on the subject: "A person has testamentary capacity who understands the nature of a testament or will, viz., that it is a disposition of property, to take effect after death, and who is capable of remembering generally the property subject to his disposition and the persons related to him by the ties of blood and of affection, and also of conceiving, and expressing by words, written or spoken, or by signs, or by both, any intelligible scheme of disposition."

But it is said that the words "non compos mentis" have been defined to mean a total want of mind or reason or understanding. Potts v. House, 6 Ga. 325, 50 Am. Dec. 329. It may be observed, in passing, that one of the cases referred to in the Potts Case (Stewart's Executor v. Lispenard, 26 Wend. [N. Y.] 255) has been said to have never been received with much favor by the legal profession generally, and has since been criticised and practically overruled in Delafield v. Parish, 25 N. Y. 9, *27. 1 Jarm. Wills (5th Am. Ed.) 93, in note A. And the case of Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141, also cited in the Potts Case, lays down a rule much like that stated above. The case of Lee's Heirs v. Lee's Ex'rs, in 4 McCord (S. C.) 183, 17 Am. Dec. 722, seems to have been cited rather to show the extreme to which the South Carolina court had gone than to approve the decision. See the remarks in regard to it in 6 Ga., at the bottom of page 351. Attention is merely called to these cases, not with any desire to enter into criticism of the opinion in Potts v. House. For the writer of that opinion, it need hardly be said, the present writer entertains the profoundest respect and esteem. In Potts v. House the expression, "a mere glimmering of reason," was used as indicating testamentary capacity. In Terry v. Buffington, 11 Ga. 337, 345, 56 Am. Dec. 423, it was said that the court were informed that the language used in the previous case had been grossly misapprehended, and they were asked to explain what was to be understood from it. The court undertook to do this, and to illustrate the meaning intended; the result being that it was held that, though the mind may be weak and dim, yet it will suffice if there be sufficient mental light, "by which the testator is enabled to comprehend the contents of his will, the nature of the estate he is conveying to his family connection, their relative situation to him, the terms upon which he stands with them, his own situation, and the circumstances which surround him." This was said by the same judge who prepared the opinion in Potts v. House; and, when thus explained, it will be seen that the test of testamentary capacity laid down is very close to, if not identical with, the rule above announced. See, also, Hall v. Hall, 18 Ga. 40. In Morris v. Stokes, 21 Ga. 552, a charge that the testator could will his property unless totally deprived of reason was held not to be error. But the charge also

stated the rule practically as above expressed. Then came the case of Stancell v. Kenan, 33 Ga. 56. Then followed the Code, where sections 3266–3268 (as they are numbered in the Code of 1895) read as follows:

"Sec. 3266. An insane person cannot generally make a will. A lunatic may, during a lucid interval. A monomaniac may make a will, if the will is in no way the result of or connected with that monomania. In all such cases it must appear that the testament does speak the wishes of the testator, unbiased by the mental disease with which he is affected.

"Sec. 3267. Eccentricity of habit or thought does not deprive a person of power of making a testament. Old age, and the weakness of intellect resulting therefrom, does not, of itself, constitute incapacity. If that weakness amounts to imbecility, the testamentary capacity is gone. In cases of doubt as to the extent of this weakness, the reasonable or unreasonable disposition of his estate should have much weight in the decision of the question.

"Sec. 3268. An incapacity to contract may coexist with a capacity to make a will. The amount of intellect necessary to constitute testamentary capacity is that which is necessary to enable the party to have a decided and rational desire as to the disposition of his property. His desire must be decided, in distinction from the wavering, vacillating fancies of a distempered intellect. It must be rational, in distinction from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard."

In Gardner v. Lamback, 47 Ga. 133, 185, a charge to the effect that terms "not of sound and disposing mind and memory" imported a total deprivation of reason was given, and this was held not to have been error. An examination of the charge which is reported shows that the judge fully gave the test laid down in the Code and in the Stancell Case in 33 Ga.; but, having in his charge employed the words "non compos mentis," he then gave a request defining them. Judge McCay said (page 193): "Our Code [the Code of 1863]—sections 2372, 2373, 2374—is in substance fairly given by the judge in his charge to the jury. Nor is the law as laid down in the Code materially different from the rulings of this court in Potts v. House, 6 Ga. 324, 50 Am. Dec. 329. To make one incapable of making a will from insanity, he must be 'non compos mentis.' There must be a 'total deprivation of reason.' However old, feeble, weak-minded, capricious, notionate he may be, if he 'be able to have a decided and rational desire as to the disposition of his property,' he is not wanting in testamentary capacity, and in making the inquiry it would seem from the very words of the Code that attention is to be given, not so much to the state of the mind as an abstract philosophical or medical question, as to its capacity for the precise thing in hand."

Since the Code and this court have laid down clearly and concisely the test of testamentary capacity practically to be applied by the jury,

after fully charging and explaining the law, we think it not always calculated to greatly aid a jury to introduce technical or Latin terms merely in order to explain them. While possibly the Code may not be materially different from the ruling in Potts v. House, when rightly understood and applied, yet confusion may be bred in this manner, if not so applied and understood. Let us illustrate. In Potts v. House, supra, it was said, in reference to testamentary capacity, that the term "non compos mentis" imported a total deprivation of reason. In Maddox v. Simmons, 31 Ga. 512, it was said that "mere weakness of mind, if the person be legally compos mentis, is no ground for setting aside a contract"; and in the opinion it was said that, to establish the incapacity of a grantor, he must be shown to have been non compos mentis in the legal acceptation of the term, "which means, not a partial, but an entire, loss of understanding." This position has been approved several times. See Nance v. Stockburger, 111 Ga. 821, 36 S. E. 100; Richardson v. Adams, 110 Ga. 425, 35 S. E. 648; Barlow v. Strange, 120 Ga. 1015, 1018, 48 S. E. 344. Our Code (section 3268) declares that "an incapacity to contract may coexist with a capacity to make a will." Now, if the Code has made no change, and selections from these various sources were made and indiscriminately charged as to the meaning of "non compos mentis," it will be readily seen that a jury might be led into this rather paradoxical tangle: Total deprivation of reason is necessary to destroy contractual capacity; less reason is necessary to make a will than a deed; that is, something more than total deprivation is required to destroy testamentary capacity, or something less than no reason at all will do to make a will. Of course, this cannot be the law; and we merely make the illustration in connection with what we have said as to avoiding confusion in the charge. In Barlow v. Strange, 120 Ga. 1017, 48 S. E. 345, it was said, as to a contract, that a charge that "a person is insane when he or she is not possessed of mind and reason equal to a full and clear understanding of the nature and consequence of his or her act, in making the contract" was sufficient to cover a request to charge that total deprivation was necessary, and that a failure to give such a request was not ground for a reversal. If this be correct, certainly a similar ruling should be applied to a charge in regard to testamentary capacity, and no new trial should be required, where the correct test, as declared by the Code and by this court, has been fully given, because of a failure to give requests to charge which were thus covered. Even the word "imbecility" has been used to denote different grades of mental weakness. Compare Potts v. House, 6 Ga. 354, 355, 50 Am. Dec. 329, Morris v. Stokes, 21 Ga. 571, and Civ. Code 1895, §§ 3267, 3268. In the Code it means complete or total imbecility, with which is being contrasted weakness of intellect less than that. The difference between "imbecility," as thus used, and "idiocy," is generally said to be that the latter is congenital, while the former arises from subsequent causes,

such as old age, disease, or accident. The insanity which we have been here discussing is general insanity, not monomania or delusional insanity.

We do not wish to be understood, from what we have said, as holding that mere weakness of intellect will authorize juries to set aside wills, if the testator has testamentary capacity as defined by law. In cases of doubt as to this, the reasonableness or unreasonableness of the disposition may be considered. But this is only to be done as evidence bearing on the question of capacity. If the testator has sufficient capacity, a jury cannot lawfully set aside the will merely because they may think it unjust or unreasonable. The law does not intrust them with any such power. Speaking of the right to make a will. Judge McCay, in Gardner's Case, 47 Ga. 133, says: "It is a precious right, and one that should be guarded with jealous care, that the aged and infirm, the weak-minded and eccentric, shall have this security for care and attention on a sickbed; and it may be truly said, without any harsh criticism on human nature, that many a fired brain has been cooled by gentle hands, and many a deathbed cheered and watched over with kind care, which, but for this tender care of the law for this testamentary right, would have been neglected and deserted." See, also, Deering v. Adams, 37 Me. 264, 269; 1 Underhill on Wills, § 114. Inasmuch, however, as the judge had contrasted weakness not amounting to incapacity with imbecility, as the Code does, we cannot say that he erred in holding that upon request he should have defined the meaning of imbecility as thus used, or that this, with other grounds, did not authorize the grant of a second new trial. What has been said above also disposes of the sixteenth and nineteenth grounds. The general charge covered the subject, and a new trial was not necessary on those grounds.[8]

[8] "A 'disposing mind' involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted and mental power enough to appreciate them, and act with sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in relation to them. * * * But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirement of a 'sound and disposing mind' does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age and failing memory from engaging in complex and intricate business, and incapable of understanding all parts of a contract and yet be able to give simple directions for the disposition of property by will. Great age may raise doubt of capacity, so far as to excite the vigilance of the

4. The propounders' request to charge set out in the seventeenth ground introduced into the case the subject of the right of a testator to leave his property to strangers, to the exclusion of his wife and children, and invoked a charge to that effect. If he does so, however, the will should be closely scrutinized, and slight additional evidence of aberration of intellect may serve to set it aside. Wetter v. Habersham, 60 Ga. 198. But the court not only added this modification, but also gave the entire section 3258 of the Civil Code of 1895, including references to collusion, fraud, undue influence, and unfair dealing. Sometimes reading an entire section of the Code will not require a reversal, although all of it may not be necessary. Brown v. State, 125 Ga. 281, 54 S. E. 162. But we will not reverse the judge for granting a new trial on this and other grounds, when he doubtless thought it might have misled the jury, and under the evidence might have worked injury.

5. Some two years before the making of the will, an application was made for an adjudication by a commission that the testator was an imbecile, and to have a guardian appointed for him. The commissioners found that he was not an imbecile. The court, on the trial of the present case arising on the propounding of the will, was requested to charge the jury to the effect that such finding was conclusive that the testator was not at its date an imbecile, that the presumption was that the same state of mind continued, and that the burden was on the caveators to show a change in his mental condition. He refused to so charge, but subsequently made this one ground for granting a new trial. Whatever may be the ruling of some courts, here it has been decided that an "inquisition of lunacy and the appointment of a guardian consequent thereon is prima facie evidence only, and not conclusive

court, but it does not alone constitute testamentary disqualification." Whitehouse, J., in Hall v. Perry, 87 Me. 569, 572, 33 Atl. 160, 161, 47 Am. St. Rep. 352 (1895). See Winn v. Grier, 217 Mo. 420, 117 S. W. 48 (1909); Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908); and a case note in 3 L. R. A. (N. S.) 172.

In Wilson v. Mitchell, 101 Pa. 495 (1882), a blind man, who was over 100 years old at the time, made a will. The court said (page 503): "Dougal had lived over 100 years before he made the will and his physical and mental weakness and defective memory were in striking contrast with their strength in the meridian of his life. He was blind; not deaf, but hearing impaired; his mind acted slowly, he was forgetful of recent events, especially of names, and repeated questions in conversation; and sometimes, when aroused from sleep or slumber, would seem bewildered." Yet he was held to have died testate.

"This court in Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167 (1889), held that, to constitute a sound and disposing mind, it is not necessary that the mind should be wholly unbroken, unimpaired, and unshattered by disease or otherwise, or that the testator be in possession of all his reasoning faculties; that a man may be competent to make a disposition of his property by will where it is simple and easy of comprehension and at the same time be incompetent to make a will which involves a very large estate and the consideration of the natural claims of a large number of relatives. Clearly, by reason and authority, therefore, each case must be largely judged in connection with its own special facts, circumstances, and surroundings." Carter, J., in Drum v. Capps, 240 Ill. 524, 542, 88 N. E. 1020, 1025 (1909).

against third persons, who were not parties to it." Field v. Lucas, 21 Ga. 447, 68 Am. Dec. 465. This was a case involving testamentary capacity. * * *

The court did not err in refusing the charge requested.[9] * * *

Judgment on the main bill of exceptions affirmed; on the cross-bill, reversed in part. All the Justices concur, except FISH, C. J., absent, and BECK, J., disqualified.

HOPKINS et al. v. WAMPLER.

(Supreme Court of Appeals of Virginia, 1908. 108 Va. 705, 62 S. E. 926.)

WHITTLE, J.[10] The plaintiffs in error, J. H. Hopkins and Susannah Hildebrand, proponents of a paper writing purporting to be the last will of Amanda E. Miller, deceased, bring error to the final sentence and judgment of the trial court approving the finding of the jury, on an issue devisavit vel non, that said paper was not, nor was any part thereof, the true last will of Amanda E. Miller.

The sole question submitted to the jury was the testamentary capacity of the testatrix, and the principal error assigned relates to the ruling of the court in the matter of the degree of proof which rested upon the proponents on the trial of that issue.

The instruction complained of told the jury "that a party who seeks to set up a will must prove by a preponderance of evidence that the paper offered for probate is the true will of a capable testator, and that nothing short of clear and convincing evidence will suffice; and, unless the jury believe that it has been established by clear and convincing evidence that Amanda Miller was a capable testatrix at the time of the execution of the paper, * * * they must find a verdict against the same."

The unqualified language of this instruction, which wholly omits the presumption in favor of sanity and announces the proposition that the

[9] "The fact that one is under guardianship as an insane person is not conclusive against his capacity to make a will while the guardianship continues. But it does not follow from this that the dismissal on the merits of an application for the appointment of a guardian of one as an insane person is conclusive in favor of his capacity to make a will. * * * The ground of appointing a guardian of a person as insane is that, by reason of mental weakness or distraction, or both, he is incapable of taking care of himself; and the object of it is to secure proper care of his person and property. * * * A man may be insane on some subjects and not on others. He may be insane on one subject and sane on all others. His insanity may be of such a character, and run along such a line, as in no wise to affect his capacity to take care of himself and his property. The insanity last mentioned would not warrant the appointment of a guardian over him, as it would not constitute the statutory cause for the appointment, and yet it might consist of such a delusion in respect of a disinherited child as to defeat a will that was the direct offspring of the partial insanity." Rowell, J., in Manley's Ex'r v. Staples, 62 Vt. 153, 155, 19 Atl. 983, 984, 8 L. R. A. 707 (1890).

[10] Part only of the opinion is given.

burden of proving testamentary capacity by clear and convincing testimony is upon the proponents, is not in harmony with the established rule on that subject, and was calculated to mislead the jury.

It is true that in probate proceedings the court or jury must be satisfied, not only that the will has been executed in accordance with the statute, but also that it is the last will of a free and capable testator. Yet in general the latter is presumed when the due execution of the will is proved. 2 Min. Inst. (2d Ed.) pp. 939, 940; Wallen v. Wallen, 107 Va. 131, 57 S. E. 596.

In Burton v. Scott, 3 Rand. 399, Judge Carr, in discussing the rules of evidence which govern questions of insanity in cases of probate, observes: "I understood the counsel for the appellants [the contestants] to lay it down, as a general rule, that it was incumbent on the devisee claiming under a will to prove the sanity of the testator; that the onus was upon him in every question of this sort. Taken in this latitude, I do not consider the position correct. The natural presumption is that every man is sane and competent to make a will, and this presumption must stand until destroyed by proof on the other side. To say that insanity must be presumed until sanity be proved would seem to be saying that insanity is the natural state of the human mind." Temple v. Temple, 1 Hen. & M. 476; Porter v. Porter, 89 Va. 118, 15 S. E. 500; Wallen v. Wallen, supra.

Where, however, the sanity of the testator is put in issue by the evidence of the contestant, the onus probandi lies upon the proponent to satisfy the court or jury that the writing propounded is the will of a capable testator. Yet, upon the trial of that issue, there is an existent presumption in favor of the testator's sanity. Indeed, of such force is that presumption in our jurisprudence that though one be on trial for a felony, involving life or liberty, when the defense of insanity is relied on, it must be proved to the satisfaction of the jury.

In Wallen v. Wallen, supra, the doctrine is thus formulated: "The burden of proving testamentary capacity is on the propounder of a will, but, when a will is offered for probate and it is shown that all the statutory formalities have been complied with, and especially when it appears that the will is wholly in the handwriting of and is signed by the testator, there is a presumption of testamentary capacity. There is, indeed, a presumption in favor of the sanity of every man until evidence that he is of unsound mind is introduced."

On the question of the quantum of proof of testator's sanity, the court approved an instruction that it must be established by "a preponderance of testimony" rather than by "clear proof."

In the leading case of Riddell v. Johnson's Ex'r, 26 Grat. 152 (a suit in equity to set aside a bequest to testator's attorney who wrote the will), the court upon a review of the authorities in this country and in England, at page 177, quotes with approval the rule laid down by Baron Parke in Barry v. Butlin, 1 Curt. Ecc. R. 637: "That the

onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator."

It was suggested in the argument of the case in judgment that a higher degree of proof of testamentary capacity was required in Tucker v. Sandidge, 85 Va. 546, 8 S. E. 650, Chappell v. Trent, 90 Va. 849, 19 S. E. 314, and Gray v. Rumrill, 101 Va. 512, 44 S. E. 697.

In those cases, it is true, the court does say that "nothing short of clear and convincing evidence will suffice," or that the proof must be "clear and convincing." But to sustain that proposition Tucker v. Sandidge cites Riddell v. Johnson. Chappell v. Trent refers to no authority, and Gray v. Rumrill cites the two former cases. So it will be observed that these cases rely upon Riddell v. Johnson, and, while they change the phraseology of the rule, it is not believed that it was intended to modify the well-settled doctrine of the degree of proof required in that class of cases.

We conclude on that branch of the case (testatrix's sanity having been drawn in question) that the burden of proving her sanity at the time of the execution of the alleged will to the satisfaction of the jury rested upon the propounders; and in determining that question the jury should also have taken into consideration the presumption in favor of testatrix's sanity. * * *

Upon these considerations we are of opinion that the sentence and judgment of the trial court should be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with this opinion. Reversed.[11]

11 On the burden of proof of testamentary capacity, see 17 L. R. A. 494, note; 6 Am. Prob. Rep. 177, note. The difference of views relates to the duty of going forward with evidence. 4 Wigmore on Evidence, § 2500.

In Swygart v. Willard, 166 Ind. 25, 33, 34, 76 N. E. 755, 759, 760 (1906), the court sustained an instruction stating, among other things, that "a monomaniac is a person who is deranged in a single faculty of his mind or with regard to a particular subject only," and that "you may find that the testator in this case was afflicted with monomania, or with delusions, or any form of mental unsoundness; but it must further appear by a preponderance of the evidence in this case that such unsoundness of mind entered into and affected the provisions of the will in controversy before you can find that the testator was of unsound mind with reference to the will in controversy."

In Will of Dardis, 135 Wis. 457, 115 N. W. 332, 23 L. R. A. (N. S.) 783, 128 Am. St. Rep. 1033 (1908), it was held that a will was properly admitted to probate on the testimony of the subscribing witnesses, although all the heirs and next of kin of the decedent and all the beneficiaries named in the will entered into a stipulation to the effect that the decedent was mentally incompetent and agreed that probate of the will should be denied. In the L. R. A. (N. S.) report will be found a case note on the validity and effect of such a stipulation. See, also, on the validity and enforceability of agreements to dispense with the probate of a will, 15 Am. & Eng. Ann. Cas. 742, note. On the related question of the validity of agreements to contest or defeat the probate of a will, see 16 L. R. A. (N. S.) 236, note; 15 Am. & Eng. Ann. Cas. 300, note. On the validity of a contract not to contest the probate of a will, see 13 L. R. A. (N. S.) 484, note.

OWEN v. CRUMBAUGH et al.

(Supreme Court of Illinois, 1907. 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442.)

VICKERS, J.[12] * * * In fact, it is conceded by contestants that the testator was sane on all subjects except Spiritualism. Aside from this, the evidence proves, beyond a reasonable doubt, that in all the relations and affairs of life the testator was entirely rational, and acted with that judgment, prudence, and foresight usually exercised by careful and successful business men. He was able to amass a large fortune for a man engaged in his line of business, and to invest and manage it so as to avoid losses and preserve it intact until the day of his death. The only basis to be found in this record for questioning the testamentary capacity of the testator is the fact that the testator was a believer in Spiritualism and the claim that this belief amounted to an insane delusion, under the influence of which the testator made the will in question. It must be admitted, under the proofs here, that the testator was an ultraist regarding all of the doctrines embraced in the articles of faith of the Spiritualist association; but that there is any evidence in this record of insanity or insane delusions, which cannot be accounted for by reason of Crumbaugh's belief in Spiritualism, cannot be maintained. Under the law of Illinois every person of requisite age, being of sound mind and memory, has the power to devise all of his property in any way he may elect; and when the validity of a will is challenged on the ground that the testator did not possess the requisite testamentary capacity, the ultimate and final question is, did the testator, at the time when the instrument was executed, possess the sound mind and memory required by section 1 of our statute of wills?

Courts and text-writers have often considered the question of what is and what is not a proper test of testamentary capacity. In Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167, this court, after an extensive review of many authorities in this and other jurisdictions, laid down the following test: "The true inquiry in every case, therefore, is, did the person whose testamentary capacity is questioned, have, at the time of making his will, such mind and memory as enabled him to understand the business in which he was then engaged and the effect of the disposition made by him of his property? If he did, he was possessed of the sound mind and memory required by the statute; and all degrees of impairment of the mental faculties, or dementia, whether senile or produced by other cause, which destroy the testamentary capacity, will disqualify, whether it has reached the stage of absolute imbecility or not." Any mere mental aberrations resulting in the subnormal exercise of the faculties, which do not result in such impair-

[12] Part only of the opinion is given.

ment of the reason, judgment, and memory as to render a testator unable to understand the business of making a will and the effect of the disposition to be made of his property, will not vitiate the will. The existence of delusions or delusional insanity is recognized, both by scientists and legal writers, as a form of insanity which, when shown to have existed in the testator at the time the will was executed and to have controlled its execution, will avoid the instrument. The existence of insane delusions on one subject is not incompatible with sanity on all other subjects. Contestants' position in the case in hand is that the testator was sane on all subjects except Spiritualism, as to which it is contended he had an insane delusion within the legal meaning of those terms, and that the will in question was the result of such insane delusions, and is therefore void. It therefore becomes necessary to examine with some particularity whether, under the evidence, such contention can be sustained.

An insane delusion which will render the sufferer incapable of making a will is difficult to define with exact precision. A delusion is said to be a belief in a state or condition of things the existence of which no rational person would believe. In re Forman, 54 Barb. (N. Y.) 274; Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; Schneider v. Manning, 121 Ill. 376, 12 N. E. 267. A delusion has also been defined as "a spontaneous conception and acceptance as a fact of that which has no real existence except in imagination, and persistent adherence to it against all evidence." Smith v. Smith, 48 N. J. Eq. 566, 25 Atl. 11; Rush v. Megee, 36 Ind. 69; Philadelphia Trust and Sav. Dep. Co. v. Drinkhouse, 17 Phila. (Pa.) 23. Again, the same definition, in substance, is given in Potter v. Jones, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161, as follows: "A conception that originated spontaneously in the mind, without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality, and springing from a diseased or morbid condition of the mind." Another form of definition, conveying substantially the same meaning, is given in Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738, and is as follows: "If, without evidence of any kind, a testator imagines or conceives something to exist which does not exist in fact, and which no rational person would, in the absence of evidence, believe to exist, he is afflicted with an insane delusion." "Whenever a person conceives something extravagant to exist, which has no existence whatever but in his heated imagination, and is incapable of being permanently reasoned out of that conception, he is under an insane delusion in a peculiar, half-technical sense of the term." Mullins v. Cottrell, 41 Miss. 291; Benoist v. Murrin, 58 Mo. 307; Stanton v. Wetherwax, 16 Barb. (N. Y.) 259. A person who believes supposed facts, which have no existence except in his perverted imagination, and which are against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, is, so far as they are concerned, under an insane delusion. In

re Shaw, 2 Redf. Sur. (N. Y.) 107; In re White, 121 N. Y. 406, 24 N. E. 935.

In setting out these various definitions, we do not do so with the purpose of giving our approval to each of them, but merely to show the different forms of expression that courts have used to express the legal conception of an insane delusion. Whatever form of words is chosen to express the legal meaning of an insane delusion, it is clear, under all of the authorities, that it must be such an aberration as indicates an unsound or deranged condition of the mental faculties, as distinguished from a mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence. A belief which results from a process of reasoning from evidence, however imperfect the process may be or illogical the conclusion, is not an insane delusion. An insane delusion is not established when the court is able to understand how a person situated as the testator was might have believed all that the evidence shows that he did believe and still have been in full possession of his senses. Thus, where the testator has actual grounds for the suspicion of the existence of something in which he believes, though in fact not well founded and disbelieved by others, the misapprehension of the fact is not a matter of delusion which will invalidate his will. Stackhouse v. Horton, 15 N. J. Eq. 202; Potter v. Jones, supra; Martin v. Thayer, 37 W. Va. 38, 16 S. E. 489; Mullins v. Cottrell, supra.

The case of Wait v. Westfall, 161 Ind. 648, 68 N. E. 271, is an instructive case on this phase of the doctrine of insane delusions. There the testator believed that he could locate hidden treasure by means of a small metallic ball suspended on a thread. He spent a great deal of his time in going over the fields trying to locate the hidden metallic treasure, and holes were dug in so many places that they became a nuisance and had to be stopped. It was shown that a silver dollar hid under the carpet in a room could be located by the peculiar vibrations of the metallic ball when it was suspended over the silver dollar, and this circumstance offered some basis for the testator's belief that he could locate money buried in the ground by the same means, and the fact that there was this basis for the testator's belief, however erroneous or mistaken the conclusion drawn therefrom, distinguished the belief from an insane delusion. It is true that the bare fact that the metallic ball would indicate, by certain vibratory motions, where a silver dollar was, might be by most persons regarded as a very trifling circumstance upon which to predicate a belief that one could find treasure hidden in the earth in the same way; but it serves to show that the belief was not a spontaneous creation of a deranged mind.

The following excerpt of the opinion of Mr. Justice Hadley in this case is pertinent to the question now under consideration: "What tribunal occupied by finite beings is qualified to adjudge false asserted forces of attraction and magnetism or the phenomena of mind, because incapable of demonstration, or that certain supernatural powers and in-

fluences do not exist, because not in accord with an assumed standard of mental action? In all the ages of the world instruments and devices have been employed in locating minerals in the earth. The fact is notorious that there are many intelligent, conservative persons who claim the power of locating water in the earth by means of a forked stick, and thousands of wells located by them have been dug and are still being dug. It is equally a matter of common report that such a stick will point downward at particular places in the hands of some men, and not in the hands of others. Many scholars and successful business men sincerely believe in Spiritualism, and of being able, not by all, but through the instrumentality of a few naturally qualified persons called 'mediums,' to converse with and be advised by the spirits of departed friends, and believe they recognize the voices and handwriting of the dead. Mental phenomena are as various as the hues of the autumnal forest. In Chafin's Will, 32 Wis. 564, it is said: 'Dr. Carver, a very intelligent medical witness, who had been in the Western mines, testified: "I have seen hundreds of men in the mountains, who came there on dreams, including lawyers, doctors, and priests. * * * Business men here in Monroe have been and searched for minerals under the direction of clairvoyants." ' Others believe in Christian Science, others in clairvoyance, others in the transmigration of souls, and others in witchcraft. To affirm or deny the truth of these things proves nothing, and demonstrates the individual to be neither a sage nor a fool. Who shall be the judge whether the mind that accepts or reflects them is the truly sane mind? If we affirm that witches do not ride broomsticks and practice their evil arts upon us, and that there are no witches, then we have Blackstone, the father of our common law, Chief Justice Mathew Hale, Coke, Sir Francis Bacon, Richard Baxter, John Wesley, Martin Luther, Cotton Mather, and a host of other eminent jurists and savants, against us; encyclopedias; Nevin's Witchcraft in Salem Village; Upham's Salem Witchcraft; Campbell's Lives of the Chief Justices, vol. 2. Early in the history of our jurisprudence much difficulty, for the reason above suggested, was experienced by the courts in fixing a standard of intellect by which testamentary capacity could be determined, and legislative bodies were not inclined to relieve the courts of their embarrassment. For instance, our statute for more than a half century has provided that all persons, except infants and persons of unsound mind, may make a will. Similar statutes have long prevailed in other states of the Union and in England. In construing these statutes the courts of both this country and England were at first disposed to hold that any mind possessed of an eccentricity, aberration, or erratic trend, such as amounted to an insane delusion, was not a sound mind within the meaning of the statute, and hence incapable. This doctrine has long since been repudiated by the courts of England, and for the most part, at least, by the courts of this country—certainly by this state since Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9. Under the law as now settled, capacity is not determined by what one

believes, nor by the character of the horrid tales he can tell. The test is, does there remain in the subject an untrammeled intellect, sufficiently strong and rational to know the value and extent of his property, the number and names of those who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, and memory sufficient to carry these things in mind long enough to have his will prepared and executed. See cases collected in Teegarden v. Lewis, 145 Ind. 98, 103, 40 N. E. 1047, 1048, 44 N. E. 9."

In the late case of Scott v. Scott, 212 Ill. 597, 72 N. E. 708, we held that a belief in Swedenborgianism and an enthusiasm manifested in propagating that faith furnish no evidence of monomania, insane delusion, or insanity. There the testator devised the greater portion of his property to a corporation which was organized for the sole object of printing, publishing, and circulating the theological works and writings of Emanuel Swedenborg, and the only evidence of delusion was the belief of the testator in the teachings of the so-called Swedenborgian Church. In disposing of that contention this court said (page 603 of 212 Ill., page 710 of 72 N. E.): "The great majority of civilized human beings believe in the existence of a life beyond the grave. Based upon that belief, many religious creeds, differing widely, have been established. The fact that an individual holds any particular belief in regard to a future state of existence cannot, of itself, be evidence of an insane delusion or monomania. An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason. Riggs v. A. H. M. Society, 35 Hun, 656; State v. Lewis, 20 Nev. 333, 22 Pac. 241; Rush v. Megee, 36 Ind. 80. We have heretofore said that 'insane delusion consists in the belief of facts which no rational person would have believed.' Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698; Schneider v. Manning, 121 Ill. 376, 12 N. E. 267. Such a delusion does not exist unless it is one whose fallacy can be certainly demonstrated; for, except such demonstration can be made, it cannot be said that no rational person would entertain the belief. Consequently no creed or religious belief, in so far as it pertains to an existence after death, can be regarded as a delusion, because there is no test by which it can be tried and its truth or falsity demonstrated. Gass v. Gass, 3 Humph. (Tenn.) 278; Buchanan v. Pierie, 205 Pa. 123, 54 Atl. 583, 97 Am. St. Rep. 725; Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211."

Tested by the rules laid down in the foregoing authorities, it is clear that the testator in the case at bar was not the victim of an insane delusion, within the meaning of the law. In the light of these authorities let us examine the occurrences which contestants rely on as showing that the testator was controlled by an insane delusion. Take, for example, the fact that the testator said that his brother and sister-in-law caused the death of his only child. The evidence explained what the

testator meant. The child was being fed from the milk of a cow belonging to the testator's brother. It is not denied that the owner of the cow took it away from the testator's home without his consent, thereby making it necessary to feed the child upon the milk of another cow. It is not denied that the child sickened and died after the change in its food. Who would say that there was no evidence whatever for the charge that the taking away of the cow was the cause of the baby's death? It is a matter of common knowledge that physicians and careful mothers exercise great care in changing the food for infants, and the fact that the testator may have believed that the change from the milk of one cow to that of another was the cause of the sickness and death of his child has some reason in it. If there had been no such circumstance as the child being fed upon the milk of this particular cow, and the whole matter were a figment of pure imagination, then there might be some reason for saying that it originated in a disordered brain. But such is not the proof. It makes no difference, with this view, that the testator believed that the facts in relation to the death of his child had been revealed to him by spiritual communication. There is nothing connected with this circumstance showing that the testator's belief in regard to spiritual communication was any different from the belief of Spiritualists in general. The preservation of the testator from threatened harm in connection with the blowing of the stump, the burning of the brush, and his falling near a step are other occurrences which illustrate how, in the mind of the testator, he connected events in his experience with his belief in Spiritualism. His belief in Spiritualism led him to account for his preservation from harm by means of spiritual guidance, while another person no more rational than Crumbaugh, but who did not believe in Spiritualism, would account for the same phenomena in some other way. The testator did not imagine that he was in a field, and that there was a person there blowing out stumps with dynamite, and that a piece of the stump was thrown in such a way that it would have struck him if he had not shifted his position; but there was, in fact, such a field, and in it were stumps which were being blown out, and the testator was there when an explosion of dynamite occurred, and it is testified to by the witness that a piece would have struck the deceased if he had not shifted his position just before the explosion. Now, all that is left of the transaction which is not susceptible of proof is the fact that the testator believed that he was led to shift his position by his guiding spirit. To hold that this is evidence of an insane delusion, when reduced to its last analysis, is to hold that a belief in Spiritualism is, in and of itself, an evidence of insanity, and that no one who believes in the articles of faith as promulgated by that organization is competent to make a valid testamentary disposition of his property. There is not in this record a scintilla of evidence of insane delusions in the testator outside of the bare fact that he believed in the general

doctrine of the Spiritualist organization. This is not insanity, and it is no evidence of a want of testamentary capacity.

In Whipple v. Eddy, 161 Ill. 114, 43 N. E. 789, this court passed on the question whether a mere belief in Spiritualism was evidence of insanity. It was there said (page 122 of 161 Ill., page 792 of 43 N. E.): "The fact that a person is affected with insanity or labors under some delusion, believes in witchcraft, clairvoyance, spiritual influences, presentiments of the occurrence of future events, dreams, mind reading, etc., will not affect the validity of his will on the ground of insanity. 1 Redfield on Wills 79, note 9; Chafin Will Case, 32 Wis. 557; In re Smith, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422. Manifestly, a man's belief can never be made a test of sanity. When we leave the domain of knowledge and enter upon the field of belief, the range is limitless, extending from the highest degree of rationality to the wildest dream of superstition, and no standard of mental soundness can be based on one belief rather than another. What to one man is a reasonable belief is to another wholly unreasonable, and while it is true that belief in what we generally understand to be supernatural things may tend to prove insanity under certain circumstances, it is a well known fact that many of the clearest and brightest intellects have sincerely and honestly believed in Spiritualism, mind reading," etc.

If it be said that the testator believed that Bright Eyes and the spirits of other deceased friends appeared and held communication with him, in and out of the seance room, that the testator believed in spiritual photography, and that he had pictures of deceased persons made in this way, it may be replied that there is in this no departure from the usually accepted faith of the Spiritualistic organization, as shown by the articles of faith testified to by Dr. Warne, whose testimony is wholly uncontradicted. It may be said that the testator believed that his son, who died in infancy, had grown to manhood in the spirit land, and that there is no evidence that Spiritualists believe in progression or growth after death. This point is not available to contestants, since proponents asked Dr. Warne to state the belief of his association on this point, and the contestants objected and the objection was sustained. Contestants will not be permitted to profit by the absence of evidence which was excluded on their objection. * * *

Proponents requested the court to direct a verdict in their favor, which was refused. If there was evidence requiring the court to submit the case to the jury, the refusal of the request was not error. If, upon the whole case, there was evidence fairly tending to support contestants' bill, the motion was properly denied. After giving this case the careful examination which its importance requires, we are firmly convinced that there is no evidence here even raising a suspicion in our minds that the testator was not entirely sane and as competent to make a will or transact any other kind of business as the average business man. We have examined the evidence with great care, and when it

is all summarized and reduced to its final results it only proves that Crumbaugh was a believer in Spiritualism; that he thought that he was doing a philanthropic work for his friends in Leroy by leaving this estate to establish this [Spiritualist] church and library; and, however much one may differ from him as to the advisability of such a devise that has nothing to do with the legal status of the will. If the testator had the capacity to make the will, he had the capacity to select the beneficiaries. This he has done, and there the matter must rest.

The court erred in refusing to direct a verdict for proponents, for which the decree must be reversed, which is accordingly done, and the cause remanded to the circuit court, for further proceedings not inconsistent with the views herein expressed. Reversed and remanded.[13]

[13] "The testator's belief in Spiritualism was not a morbid fancy, rising spontaneously in his mind, but a conviction produced by evidence. The proofs show that, when he first commenced attending what are called 'seances,' he was inclined to be skeptical; afterwards his mind seemed to be in an unstable condition—he sometimes believed and at others doubted—and that it was not until the spirits gave an extraordinary exhibition of their power, by printing or painting on a pin, worn by his mother-in-law on her neck, in brilliant letters, which sparkled like diamonds, the word 'Dickie,' a pet name of his dead wife, that his last doubts as to the reality of the manifestations were removed. Believing, as I do, that these manifestations were correctly described by Vice Chancellor Giffard in Lyon v. Home, L. R. 6 Eq. 655, 682, when he called them 'mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious, and, on the other, to assist the projects of the needy and of the adventurer,' still it seems to me to be entirely clear that it cannot be said that a person who does believe in their reality is, because of such belief, of unsound mind, or subject to an insane delusion. No court has as yet so held." The Vice Ordinary, in Middleditch v. Williams, 45 N. J. Eq. 726, 735, 17 Atl. 826, 4 L. R. A. 738 (1889).

"It does not follow, however, that one may not have such a faith in spiritualism as to destroy his testamentary capacity. He may think so continually and persistently upon this subject, as upon many other subjects, as to become a monomaniac, incapable of reasoning, where this subject is concerned. In that case it should be said that a will made in consequence of such monomania is void for lack of testamentary capacity. Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211 (1897). So, too, a believer in Spiritualism may have such extraordinary confidence in Spiritualistic communications—whether those communications reach him through mediums or are received by him as he believes directly—that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of testator, and is therefore not admissible to probate. We need not speculate as to the ground upon which this conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity, or, as held by the trial court, upon the ground of undue influence." Carpenter, C. J., in O'Dell v. Goff, 149 Mich. 152, 158, 112 N. W. 736, 738, 10 L. R. A. (N. S.) 989, 119 Am. St. Rep. 662 (1907). On the undue influence of Spiritualism, see 63 Am. St. Rep. 93, 94, note. For a discussion of testamentary capacity as affected by belief in spiritualism, see 10 Am. & Eng. Ann. Cas. 617, note; 5 Prob. Rep. Ann. 226, note; 8 Prob. Rep. Ann. 455, note; 13 Prob. Rep. Ann. 68, note; 16 L. R. A. 677, note; 15 L. R. A. (N. S.) 674, note.

For the effect on testamentary capacity of a belief in metempsychosis, see Bonard's Will, 16 Abb. Prac. (N. S.) 128 (1872); in Swedenborgianism, see Scott v. Scott, 212 Ill. 597, 72 N. E. 708 (1904); in faith cure, see Taylor v. Trich, 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679 (1895); in Christian Science, see

SECTION 6.—FRAUD AND UNDUE INFLUENCE [14]

WILKINSON v. JOUGHIN.

(High Court of Chancery, 1866. L. R. 2 Eq. 319.)

William Thompson, who died in July, 1864, by his will dated the 20th of May, 1864, devised and bequeathed all his real and personal estate to the plaintiff and the defendant Joughin, whom he also appointed executors, upon trust "to permit my wife, Adelaide, to receive from my death the net annual income thereof during her life." And after her death the testator directed his trustees to sell his real estate, and to convert and get in his personal estate, and to invest the moneys to arise in trust for the benefit of his children; but if no child of his should attain the age of twenty-one, or be married, then upon trust to pay certain legacies; and as to the residue, "In trust for my stepdaughter, Sarah Ward, for her absolute use. But in

In re Brush's Will, 35 Misc. Rep. 689, 72 N. Y. Supp. 421 (1901); in Spiritualism and Christian Science, see Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592 (1906).

For discussions of mental capacity in general, see 5 Prob. Rep. Ann. 382, note; Id., 224, note; 2 Prob. Rep. Ann. 352, note; 63 Am. St. Rep. 94–99, note. On aversion to relatives as affecting mental capacity to make a valid will, see 117 Am. St. Rep. 582, note. And see Fulton v. Freeland, 219 Mo. 494, 118 S. W. 12 (1909). On suicide as evidence of testamentary incapacity, see 24 L. R. A. 577, note; 4 Wigmore on Evidence, § 2500. On drunkenness and morphinism as affecting testamentary capacity, see 39 L. R. A. 220, note; Id., 262, note; 6 Prob. Rep. Ann. 200, note; 2 Am. Prob. Rep. 526, note. On monomania as affecting testamentary capacity, see 1 Prob. Rep. Ann. 377, note. See, also, Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908).

[14] "Lord Cranworth appears * * * to have regarded fraud as a species of undue influence. It is a mere question of terms; but by the rules of pleading established in this court since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence as a term used in a plea in this court raises the question of coercion, and that only." Lord Penzance in Parfitt v. Lawless, L. R. 2 P. & D. 462, 470, 471 (1872).

"In strictness, 'undue influence' and 'fraud' are distinguishable. In one case the mind of the testator is so overmastered that another will is substituted for his own. In the other he is in a sense a free agent, but is deceived into acting upon false data [citations]. But more often than otherwise it is a mere question of terms. Something sinister is involved, which perverts the testator's will by overcoming his power truly to express his real desires." Burch, J, in Ginter v. Ginter, 79 Kan. 721, 735, 736, 101 Pac. 634, 640, 22 L. R. A. (N. S.) 1024 (1909). See, also, In re Snowball's Estate (Cal.) 107 Pac. 598 (1910).

"There is no doubt that undue influence may be exerted upon a testator, either by fraudulent means or devices or by physical or moral coercion practiced upon him without any actual deception." Sheldon, J., in Whitcomb v. Whitcomb (Mass.) 91 N. E. 210 (1910).

For discussions of undue influence as affecting the validity of wills, see 21 Am. St. Rep. 94, note; 31 Am. St. Rep. 670, note; 6 Prob. Rep. Ann. 300, note; 5 Am. Prob. Rep. 589, note. On the admissibility of declarations of testator, not made at the time of the execution of the will, on questions of undue influence, see notes in 5 Am. & Eng. Ann. Cas. 608, and in 10 Am. & Eng. Ann. Cas. 600.

case she shall die without leaving issue, upon trust to pay the same moneys to John Wilkinson and my cousin, Anne Hammond, in equal shares. I direct that my wife shall out of the income of my said estate maintain, educate, and bring up my children until the age of twenty-one years (but my trustee shall not be obliged to see this direction fulfilled), and that she shall receive and enjoy such income as her separate estate, without the control or interference of any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same."

The testator left no issue him surviving. The bill alleged that on the 15th of October, 1849, Thomas Ward and Adelaide Ward (then Rowntree) were married at Great Grimsby, and that the defendant Sarah Ward was a child of that marriage; and that on the 20th of May, 1863, the defendant Adelaide Ward and the testator went through the ceremony of marriage at Liverpool—the defendant Adelaide Ward having represented herself to the testator as, and he having believed her to be, a widow—the defendant Thomas Ward, her husband, being then, and in March, 1865, when the bill was filed, alive. The plaintiff submitted to the judgment of the court, whether the defendant Adelaide Ward, or the defendant Thomas Ward, her husband, in her right, could take any interest under the will; and also what interest (if any) the defendant Sarah Ward took under it; and prayed that the trusts might be performed by the court, and for a declaration as to the rights of all persons interested under the will, and for an account and inquiries. The evidence, in the view taken of it by the court, sustained the conclusion that the misrepresentation by Adelaide Ward was wilful.

Sir JOHN STUART, V. C. In my opinion the bequest in favor of Adelaide Ward is void. She has sworn in her answer that which has been distinctly disproved. The evidence shows that she imposed in a gross manner upon the testator. Therefore, there must be a declaration to the effect that the bequest to Adelaide Ward, the pretended wife of the testator, is wholly void, and then there must be the usual decree for administration.

The right of the infant, Sarah Ward, seems to me very clear. An attempt has been made to show that inasmuch as the testator was defrauded by the woman whom he believed to be his wife, and was, through that fraud, induced to believe that her child was his stepdaughter, the bequest to her wholly fails. But in the case referred to of Kennell v. Abbott, 4 Ves. 802, Lord Alvanley took care to distinguish between the cases of an innocent and a fraudulent legatee, and in my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description. Sarah Ward, therefore, is entitled under the will, but I have some difficulty in saying that she is absolutely entitled, as there is a gift over in case she shall die under twenty-one years of age, and without issue.

Declare that the gift to Sarah Ward is valid, and the question, whether absolutely or not, will be left open until the hearing on further consideration.[15]

[15] "But upon general principles I am of opinion it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine that, where from circumstances not moving from the legatee himself the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and which might entitle him, though he might not fill that charac ter in which the legacy is given. My decision, therefore, totally avoids such a point. Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent, and to determine that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy." Sir Richard Pepper Arden in Kennell v. Abbott, 4 Ves. 802, 808, 809 (1799). But see Wenning v. Temple, 144 Ind. 189, 41 N. E. 600 (1895). Where the testator knows that his "wife" has a first husband living and undivorced, the gift to her as wife is good. In re Wagstaff, [1907] 2 Ch. 35, [1908] 1 Ch. 162. So where testatrix knows that her "husband" has a first wife living. In re Will of Donnely, 68 Iowa, 126, 26 N. W. 23 (1885); Moore v. Heineke, 119 Ala. 627, 24 South. 374 (1898). See, also, Meluish v. Milton, L. R. 3 Ch. Div. 27 (1876), where the lower court thought the testator had a suspicion, if not information, that the woman's husband was living. Compare Baker's Will, 2 Redf. Sur. 179 (N. Y., 1876). See, also, post, p. 306, note.

In Howell v. Troutman, 53 N. C. 304 (1860), the testator, a white man, being induced by his housekeeper, a white woman, to believe that the latter's mulatto child was his, bequeathed $250 to the housekeeper, provided she would look after testator's widow, and gave the residue of his estate to the child, with a gift over if the child should die without lawful children or child. The trial court charged the jury that there was no evidence of such influence as would invalidate the will, and the will was probated. In sustaining the action of the trial court, the upper court said: "Supposing that he did believe the child was his, and that the mother of it told him so; there is not the slightest testimony to show that she ever asked him to make a will in favor of her and the child, or that she knew, before the will was made, that he intended to make one, or, afterwards, that he had made it. * * * At most, it is said that she made him believe that he had begotten a child by her, which everybody but himself could see was a mulatto. Surely that alone cannot destroy a will which the mother is not shown to have had the slightest agency in procuring. * * * The truth is that the old man, being childless by his wife, took a strange fancy to the child of his housekeeper, and, whether it were his own or not, he had a father's love for it, and our law imposes no prohibition upon a man to prevent him from bestowing his property upon the object of his affection." Battle, J., in Howell v. Troutman, 53 N. C. 304, 307, 308 (1860). But see Ex parte Wallop,

DOE ex dem. SMALL v. ALLEN.

(Court of King's Bench, 1799. 8 T. R. 147.)

Ejectment. Evidence in regard to the execution of a will was offered by the defendant and rejected. A verdict was given for the plaintiff, with liberty to the defendant to move for a new trial in case the evidence ought to have been received. A rule to show cause was obtained.[16]

Lord KENYON, C. J. I think that this evidence ought to have been received. The testator having made one will, which (is admitted) was a good will, and being pressed by certain persons around him to make another will, asked in the presence of credible witnesses whether or not the second will which was brought to him to be executed was the same as the first, which was answered in the affirmative. It turns out that it was different from the first will, and the question here is whether or not that evidence ought to be received. Our decision will not in the least tend to repeal the Statute of Frauds, or contradict the case of Selwin v. Browne [Cas. temp. Talb. 240 (1734)]. I agree that the contents of a will are not to be explained by parol evidence; but, notwithstanding that act, evidence may be given to shew that a will was obtained by fraud. And the effect of the evidence offered in this case was to shew that one paper was obtruded on the testator for another which he intended to execute.

GROSS, J. It seemed to be admitted at the bar that evidence may be given to shew that one paper was substituted for another, and that I think is sufficient to decide this case. For the evidence proposed to be given was this: That when the testator asked for a duplicate of his former will the persons about him substituted another instead of it.

LAWRENCE, J., declared himself of the same opinion.

Rule absolute.

WINGROVE v. WINGROVE.

(High Court of Justice, Probate Division, 1885. 11 P. D. 81.)

The plaintiff as a legatee propounded a will dated the 15th of September, 1869, of Elizabeth Wingrove, late of 87 Long Lane, West Smithfield, and alleged that a codicil dated the 9th of October, 1880, which revoked some of the gifts to him, was procured by the undue influence of the defendants. The defendants in the statement of defence denied that the codicil was procurd by undue influence, and

4 Bro. C. C. 90 (1792), and Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402 (1828). Compare the holding that undue influence exerted by a mother may vitiate a will in favor of her child. Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289, 116 Am. St. Rep. 145 (1907). Compare, also, Coghill v. Kennedy, 119 Ala. 641, 24 South. 459 (1898).

[16] The statement of facts is abbreviated.

claimed probate of it together with the will. The action had been tried by a common jury, who found a verdict for the plaintiff, which was subsequently set aside and a new trial ordered by a special jury.

Sir JAMES HANNEN (President), in addressing the jury said: Gentlemen of the jury, I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this court, that there is no subject upon which there is a greater misapprehension.

The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word "influence"; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favor. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.[17]

To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favor, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result,

[17] Compare remarks by Lord Cranworth, C., in Boyse v. Rossborough, 6 H. L. Cas. 2, 47–48 (1857). See, also, Ginter v. Ginter, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024 (1909). "Influence may be degrading and pernicious, and yet not undue influence in the eye of the law. The leading authority on the subject is the judgment of Cranworth, L. C., in Boyse v. Rossborough." Lord Macnaghten, in Baudains v. Richardson, [1906] A. C. 169, 184.

and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it."

If therefore the act is shown to be the result of the wish and will of the testator at the time, then, however, it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavored to persuade and has succeeded in persuading the testator to adopt that view—still it is not undue influence.

There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.[18]

[18] "Mere suspicion, however strong, is not of itself enough to warrant a finding of fraud and undue influence. On the other hand, it is not necessary that there should be direct evidence of fraud and undue influence in order to justify such a finding, though it often happens that such evidence is produced. It is of the nature of fraud and undue influence that they may be exercised in indirect and underhand ways, difficult to be come at, and to be judged of only by their results. The will of a testator may be coerced and fraud committed upon him in various ways, and what would constitute fraud and coercion in one case might not in another. There is no hard and fast rule. A person may be so situated, so weak and feeble, or so dependent on another, for instance, that mere talking to him or pressing a matter upon him would so affect him that, for the sake of quietness, he might do that which he did not want to do, and which, if his health had been better, or his will stronger, he would not have done. Such a case would constitute or might be found to constitute coercion as truly as force or duress." Morton, J., in Hoffman v. Hoffman, 192 Mass. 416, 419, 78 N. E. 492, 493–494 (1906).

"The word 'undue,' when used to qualify influence, has the legal meaning of 'wrongful.' Hence 'undue influence' means a wrongful influence. * * * An influence exerted over another, which deprives him of his free agency and makes the will speak the will of another and not that of the testator, cannot be other than wrongful, however acquired. The influence of affection or partiality for a child, coupled with persuasion or solicitation, is not wrongful in the legal sense of the term, but would be if it went to the extent of depriving the testator of his free agency." Vickers, J., in Dowie v. Sutton, 227 Ill. 183, 197, 81 N. E. 395, 401, 118 Am. St. Rep. 266 (1907).

"The fraud, force, or undue influence that will suffice to set aside a will must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made." Wolverton, J., in In re Holman's Estate, 42 Or. 345, 358, 70 Pac. 908, 913 (1902). See Larabee v. Larabee, 240 Ill. 576, 88 N. E. 1037 (1909); Hart v. Hart (Tex. Civ. App.) 110 S. W. 91 (1908).

HACKER v. NEWBORN.

(Upper Bench, 1654. Style, 427.)

If a Man make his Will in his Sickness, by the over-importuning of his Wife, to the end he may be quiet, this shall be said to be a Will made by constraint, and shall not be a good Will. By Roll, Chief Justice, In a Tryal at the Bar in the Case of one Hacker and Newborn, Mich. 1654.[19]

In re STORER'S WILL.

STORER v. ZIMMERMAN.

(Supreme Court of Minnesota, 1881. 28 Minn. 9, 8 N. W. 827.)

GILFILLAN, C. J.[20] * * * The contestant offered to prove the amount of property the testator had at the date of the will, which proof was excluded. This is alleged as error. It is insisted that the proof would have shown there was great inequality in the distribution of his property among those naturally the objects of his bounty, and that that fact, in connection with evidence tending to show impaired mind and memory, which evidence was given, is evidence of undue influence on the part of those who seem to be favored by the will.

Where there is evidence, independent of any question of inequality in the will, tending to show acts of undue influence over the testator to procure him to make the will, on the part of those who appear to

[19] "Keeping peace in one's family can scarcely be an unlawful or immoral object. There would seem to be no legal objection to a testator's devising his property for that sole purpose, if he deliberately concludes of his own free will that such is his best policy. Of course, he must not have been coerced into making it. * * * The right to freely dispose of one's property must include the right to do so in such a way as to maintain the family peace, and even the making of that one's sole object." Hastings, C., in Davidson v. Davidson, 2 Neb. (Unof.) 90, 99, 96 N. W. 409, 411, 412 (1901). On the coercion of a promise made to a deceased husband, see Henderson v. Jackson, 138 Iowa, 326, 111 N. W. 821 (1907).

"To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's." Sir J. P. Wilde, in Hall v. Hall, L. R. 1 P. & D. 481 (1868).

[20] Part only of the opinion is given.

be preferred, evidence that the distribution is grossly unequal may be given in aid of such evidence of undue influence, to show indeed the result, as well as strengthen the evidence, of undue influence. But mere inequality, however great, in the distribution of the property among children or relatives, is no evidence of undue influence, nor is it made such by evidence of impaired mind. If it were evidence from which a jury might find undue influence to avoid the will, the issue practically presented to the jury in every case of the kind would be: Is the will such as the jury, if in the testator's circumstances, would have made? Few wills could stand if such were the test. Any man of sufficient capacity, where his power to dispose of his property is not limited by statute, has a right, in disposing of it by will, to use his own judgment and consult his own preferences without regard to how such disposition may be approved or disapproved by others.[21] * * *

Judgment affirmed.

In re TYNER'S ESTATE.

TYNER et al. v. VARIAN et al.

(Supreme Court of Minnesota, 1906. 97 Minn. 181, 106 N. W. 898.)

ELLIOTT, J. This is an appeal from a judgment of the district court, sustaining the will of John Tyner after the probate court had refused to admit it to probate.

John Tyner died testate, November 10, 1903, at the age of 87, leaving as heirs at law three sons, Richard, Thomas, and John, one daughter, Rebecca O'Leary, the children of two deceased daughters, and his wife Margaret. The will in question was executed July 2, 1891. The property consists of 160 acres of land in Dakota county, Minn., and personal property of about the value of $4,500. Under the will Richard, Thomas, and John receive $2.50 each. To the wife, Margaret, is given "all the rest, residue and remainder of my property, both real or personal, or mixed, of which I may die seised or possessed, to have and to hold for and during the term of her natural life, and to use as she may deem best, and I do hereby authorize my said wife to dispose of any of the personal effects and convert the same into money and to use so much of the money as may be necessary for her personal support."

After the death of the wife, Rebecca O'Leary, the daughter, and Mary A. Bird, a niece, are given $500 each "out of my moneys and credits, if so much remains after the payment of all claims and ex-

[21] See Morgan v. Morgan, 30 App. D. C. 436 (1908); Donnan v. Donnan, 236 Ill. 341, 86 N. E. 279 (1908); Winn v. Grier, 217 Mo. 420, 117 S. W. 48 (1909). On the effect of unnatural or unreasonable disposition of property on the question of undue influence, see 6 L. R. A. (N. S.) 202, note; 22 L. R. A. (N. S.) 1024, note; 7 Am. & Eng. Ann. Cas. 894, note; 13 Am. & Eng. Ann. Cas. 1044, note.

penses of the last sickness of myself and wife." Other small bequests were made, but they are not important as far as this appeal is concerned. After the death of Margaret Tyner, all the land owned by John Tyner is given to Richard and William Varian, the nephews of the wife, Margaret. The result is that Margaret Tyner is given the use of the land and of all the personal property during her life, and at her death the land goes to her nephews, to the entire exclusion of the children of the testator. The contestants, the children of the testator, contend that the will is the result of undue influence exercised by Margaret Tyner, the wife of the testator.

1. The right to dispose of property by will is the creature of positive law, but it is carefully guarded and protected. A person who has testamentary capacity may make such a disposition of his property as conforms to his ideas of justice and propriety. He may be guided by lofty and beneficent motives, or by sordid prejudice and personal dislike. The justice and righteousness of his final dealings with those who are the natural objects of his bounty and toward whom he has assumed solemn duties and obligations are to be determined by the final judge of all human conduct. Subject to very limited statutory restrictions, the power of testamentary disposition is absolute.

But a valid will must be the result of the voluntary act of the testator, and not merely express the will of some other person. The wife, and other possible objects of his bounty, may properly influence his actions; but this influence must not be so great as to destroy his power of will. The words "undue influence" carry with them their own limitation. The influence must not be undue. To constitute undue influence the testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or voluntarily and is subject to the will and purpose of another. It may be exerted through threats, fraud, importunity, or the silent, resistless power which the strong often exercise over the weak or infirm. It must be sufficient to destroy his free agency and substitute the will of another for that of the testator. Entreaty, importunity, or persuasion may be employed, as may appeal to the memory of past kindnesses and the calls of the distressed. Mere suggestions or advice addressed to the understanding or judgment of the testator never constitute undue influence; neither does solicitation, unless the testator is so worn out with importunities that his will gives way. Robinson v. Robinson, 203 Pa. 401, 53 Atl. 253.

The fact that the will is inofficious, harsh, and unjust is not in itself evidence that it was induced by undue influence. Mitchell v. Mitchell, 43 Minn. 73, 44 N. W. 885. Nor is the fact that the beneficiary under the instrument had special opportunities to exert undue influence over the testator. But when there is evidence, independent of any question of inequality in the will, tending to show acts of undue influence over the testator to procure the will on the part of those who appear to have been preferred, the fact that the distribution of property

is grossly unequal and unjust may be received to strengthen the evidence of undue influence. In re Storer's Will, 28 Minn. 9, 8 N. W. 827; Nelson's Will, 39 Minn. 204, 39 N. W. 143; Mitchell v. Mitchell, 43 Minn. 73, 44 N. W. 885; Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598; In re Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; Clarity v. Davis, 92 Minn. 60, 99 N. W. 363; Fisher v. Sperl, 94 Minn. 421, 103 N. W. 502; Mackall v. Mackall, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84; Manatt v. Scott, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293.

Generally the burden of showing that a will was procured by undue influence rests upon those who assert the fact; but when the contestants have made a prima facie case, by the production of evidence from which the presumption of undue influence arises, the burden is then upon the proponents to show that the instrument is the will of the testator. It is not very material whether we say that in such a case the burden shifts, or that the evidence produced, aided by the presumption which arises therefrom, is evidence sufficient to make a prima facie case. Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; Elliott, Evidence, vol. 1, § 92; Thayer, Prelim. Treatise on Evidence, p. 551. What is meant is that a point is reached when the contestant prevails unless the proponent assumes the obligations of going forward with his evidence. In re Sperl's Estate, supra, and cases there cited; Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Doyle v. Welch, 100 Wis. 24, 75 N. W. 400; Disch v. Timm, 101 Wis. 179, 77 N. W. 196; Rivard v. Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; Fisher v. Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357, note; Clarity v. Davis (Minn.) supra.[22]

In the light of these general principles we proceed to a review of the evidence. It is not possible to set out all the testimony; but a very brief summary will be sufficient to show that the contestants fulfilled all the requirements necessary to make a prima facie case of undue influence, and that it was not overthrown by the evidence offered by the respondent. John Tyner's first wife died in 1866, and within two

[22] "In the proof of undue influence, negativing the capacity of a testator, there is a difference of judicial opinion, as in the case of insanity, but here it goes back to the main burden of persuasion; i. e., by one opinion, the voluntariness of the testator's act is a part of the proponent's case, and with the jury he has the risk of non-persuasion; by the other view, the fact of undue influence is treated as in the nature of a defensive plea of the contestant, and therefore to be proved as a part of his case." 4 Wigmore on Evidence, § 2502.

"One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intention of the testator should not be thwarted without clear reason therefor." Brewer, J., in Beyer v Le Fevre, 180 U. S. 114, 125, 126, 22 Sup. Ct. 765, 770, 46 L. Ed. 1080.

months thereafter he married Margaret Varian. When the second wife came into the family, she found four children, all under 18 years of age. Almost from the beginning the family life was unhappy. She evidently took a dislike to the children, and soon began a systematic effort to drive them from the home. In this she was ultimately successful. The children were frequently whipped by the father at her request. They were not allowed the food which was supplied to the other members of the family. They were deprived of proper and necessary clothing and schooling and seem to have been generally ill-treated. One of the boys returned home on two occasions and was refused admission by his stepmother. Another farmed the land for two years, but finally left because of trouble with Margaret. A few years later the father sent for him, and he made another attempt to run the farm, with the same result. She disliked them, and was determined that they should not be at home with their father. It clearly appears that the boys were driven from home by the continuous ill treatment of Margaret Tyner. During the last illness of John Tyner his wife would not permit reports of his condition to be sent to his absent children, and she prevented the news of his death reaching them until it was too late for them to attend the funeral. There is no evidence that the children were to blame, and in view of the age and relation of the parties it should not be presumed. John Tyner was an illiterate man, unable to read or write. He seems to have had some natural capacity for acquiring and retaining money, which he concealed about the premises in old tomato cans. The testimony shows that Margaret was much the stronger character, and generally had her way about household and business affairs. She had some education, and her husband, as is usual in such cases, overestimated the importance of a little book learning. He was so deaf that it was necessary for her to be with him when he transacted any business and do most of the talking. He seems to have relied largely upon her for his information and trusted to her judgment. She was persistent, energetic, and resourceful. Like her husband, she was in the habit of drinking, and they frequently went to town and got drunk together.

The property and its final disposition seems to have been continually in her mind, and from the first she determined that the children should never have the land. She told the neighbors that the land had been promised to her brother's children. She kept everlastingly talking to her husband about the worthlessness of the boys, and accused them of being lazy, thieving, and shiftless. Her purpose, it may fairly be assumed, was to so prejudice his mind against them that he would cast them off and leave his property to others of her choosing. She told the neighbors that the children should not have the land. When the will was made Margaret was with the testator, making suggestions and doing part of the talking. After it was made she expressed her approval of its contents, and from that time until the death of John Tyner she exerted her influence to prevent him from becoming recon-

ciled to the children and changing the will. She said "the will was made the way she wanted it, and was not going to be changed." It is apparent that she earnestly desired to influence her husband in the making of his will, and that she was induced to do this by her dislike of the children and her desire to have the land go to her own relatives. She was also to some extent personally benefited by the will, as she received all the law would give her, and in addition thereto she was given complete control over all the personal property during her life.

But the ultimate question is whether her influence actually induced the will. It is certain that it was exerted for the purpose of controlling the making of the will and the disposition of the property. John Tyner stated to disinterested parties that Margaret would not permit him to leave the land to the children. He told the witness Flannery that he gave the boys nothing, because Margaret did not want them to have anything. He also told Mrs. Joego that he was not going to give any of the land to his children, because Margaret "would not allow him to." The same statement was made to Mary Tyner. All of this evidence stands uncontradicted. Margaret was present at the trial, but was not called as a witness. John Tyner's wife and children were the natural beneficiaries of the property, and there is nothing to show that the children were not deserving of his consideration. The attempt to show that they had improperly left home and neglected their father failed completely. There being evidence of this character in the case, the inofficious, harsh, and inequitable character of the will may also be taken into consideration. The Varians, who received the homestead, are not of the blood of the testator, but are the nephews of his wife. As far as the record shows they had never done anything for John Tyner, except farm the land for a time, nor was he under any obligation to them. The evidence thus presents a much stronger case than appeared in Clarity v. Davis, 92 Minn. 60, 99 N. W. 363, where Chief Justice Start, speaking for the court, said: "In view of these admitted facts and the relation existing between the legatee and the testator, the claim of the appellant that the burden was upon the respondent to show by clear and satisfactory evidence that the testator was mentally competent to make his will and that its execution was not procured by undue influence and fraud is, as it must be, conceded by the respondent."

Judgment reversed, and new trial ordered.[23]

[23] "It is impossible to define or describe with precision and exactness what is undue influence, what the quality and the extent of the power of one mind over another must be to make it undue, in the sense of the law, when exerted in making a will. Like the question of insanity, it is to some degree open and vague, and must be decided by the application of sound principles and good sense to the facts of each given case. Lynch v. Clements, 24 N. J. Eq. 431 (1874). But the influence exercised over a testator, which the law regards as undue or illegal, must be such as to destroy his free agency; but no matter how little the influence, if the free agency is destroyed, it vitiates the act which is the result of it. * * * The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding

In re SMITH'S WILL.

(Court of Appeals of New York, 1884. 95 N. Y. 516.)

Appeal from a judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 23, 1883, which affirmed a decree of the surrogate of Ulster county, admitting to probate the will of Eliza M. Smith, deceased.

The proponent, William Lawton, was the chief beneficiary under the will of September 13, 1880, propounded for probate. He was a lawyer, he drew the will, and had been the legal adviser of the decedent, for whom he had drawn several wills prior to the one in question. The will was drawn and executed on the day of its date, during the last sickness of the testatrix, who died five days thereafter. She had no heirs or next of kin, and at the time of her death was more than 75 years of age. The probate of the will was contested by Eliza J. Hamilton on the ground of the incapacity of the testatrix and of fraud and undue influence. The contestant was a legatee in three wills executed by the testatrix, the first dated February 13, 1878, the second July 13, 1880, and the third July 18, 1880. By the first and second wills she was made residuary legatee. By the third she was given a legacy of $3,000, and by the same will other legacies to the amount of $2,500. The proponent was made residuary legatee. The wills of July 13, 1880, and July 18, 1880, were drawn by the proponent. By the will in controversy the testatrix gave to St. John's Church, Kingston, a legacy of $500; to Mrs. Josephine Peters, $500; to George L. Lawton, the son of proponent, $2,000; to Walter S. Hamilton, her stock in the Lake Shore Railroad; and to the proponent (whom she made executor) the residue of her estate. * * *

ANDREWS, J.[24] Undue influence, which is a species of fraud, when relied upon to annul a transaction inter partes, or a testamentary disposition, must be proved, and cannot be presumed. But the relation in which the parties to a transaction stand to each other, is often a material circumstance and may of itself in some cases be sufficient to raise a presumption of its existence. Transactions between guardian and ward, attorney and client, trustee and cestui que trust, or persons one

the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of the person to wield it, and the acts and declarations of such person." Earl, J., in Rollwagen v. Rollwagen, 63 N. Y. 504, 519 (1876). See In re Hoffmann's Estate, 151 Mich. 595, 115 N. W. 690 (1908).

"Where there is evidence tending to show senile dementia, the jury might be justified in inferring undue influence from circumstances which would not otherwise justify such an inference; but the fact of exercising undue influence must not be left to mere inference from opportunity, interest, and mental weakness." McClain, J., in Re Overpeck's Will (Iowa) 120 N. W. 1044, 1046 (1909).

[24] Part only of the statement of facts and of the opinion is given.

of whom is dependent upon and subject to the control of the other, are illustrations of this doctrine. Dealings between parties thus situated, resulting in a benefit conferred upon, or an advantage gained by, the one holding the dominating situation, naturally excite suspicion, and when the situation is shown, then there is cast upon the party claiming the benefit or advantage, the burden of relieving himself from the suspicion thus engendered, and of showing either by direct proof or by circumstances that the transaction was free from fraud or undue influence, and that the other party acted without restraint and under no coercion, or any pressure direct or indirect, of the party benefited. This rule does not proceed upon a presumption of the invalidity of the particular transaction, without proof. The proof is made in the first instance when the relation and the personal intervention of the party claiming the benefit is shown. The law is not so impracticable as to refuse to take notice of the influence of greed and selfishness upon human conduct, and in the case supposed it wisely interposes by adjusting the quality and measure of proof to the circumstances, to protect the weaker party and, as far as may be, to make it certain that trust and confidence have not been perverted or abused. Nesbit v. Lockman, 34 N. Y. 167; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Marx v. McGlynn, 88 N. Y. 357 [1882].

The rule to which we have adverted seems, however, to be confined to cases of contracts or gifts inter vivos, and does not apply, in all its strictness at least, to gifts by will. It has been held that the fact that the beneficiary was the guardian, attorney, or trustee of the decedent does not alone create a presumption against a testamentary gift, or that it was procured by undue influence. Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689; Parfitt v. Lawless, L. R. 2 Pro. & Div. 462. The mere fact, therefore, that the proponent was the attorney of the testatrix did not, according to the authorities cited, create a presumption against the validity of the legacy given by her will. But taking all the circumstances together—the fiduciary relation, the change of testamentary intention, the age, and mental and physical condition of the decedent, the fact that the proponent was the draftsman and principal beneficiary under the will and took an active part in procuring its execution, and that the testatrix acted without independent advice—a case was made which required explanation, and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammeled, and intelligent expression of the wishes and intention of the testatrix. See note to Huguenin v. Bassley, 2 W. & T. Leading Cas. in Eq. 1156; Redfield on Wills, 515, and cases cited.[25]

[25] There is some conflict of authority on the question of whether the rule as to gifts inter vivos should be applied to wills. See 1 Woerner's American Law of Admin. (2d Ed.) § 32. For the argument against applying it to wills, see Parfitt v. Lawless, L. R. 2 P. & D. 462 (1872). In Lockwood v. Lockwood, 80 Conn. 513, 522, 69 Atl. 8, 11 (1908), the court recognizes and enforces the

The surrogate reached a conclusion adverse to the contestant upon both grounds upon which the validity of the will was questioned. He found that the testatrix had testamentary capacity and that the will was not procured by any fraud or undue influence. We think there was evidence to support the conclusion of the surrogate upon both points. But upon neither was the case free from doubt. We do not intend to enter into a discussion of the facts. We have reached the conclusion that the judgment ought to be reversed for errors in the admission of evidence on the question of undue influence, which was calculated to, and which we cannot say may not have had a material influence upon the determination of the surrogate. * * *

The judgment of the General Term and of the surrogate is therefore reversed.[26]

rule that, while the opponents of a will have in general to show undue influence affirmatively, yet "in certain cases—where the natural object of the testator's bounty is excluded from participation in his estate, where a stranger supplants children, and the will is in favor of the lawyer drawing and advising as to its provisions, or the guardian having charge of his person and estate, or of the person occupying a clearly analogous position of trust—there is imposed upon the proponents of the will, upon the trial of the issue thus raised, the obligation of disproving by a clear preponderance of evidence the affirmation of the actual exercise of undue influence by such beneficiaries of the will." See, also, Byrnes v. Gibson (N. J. Prerog.) 68 Atl. 756 (1908).

[26] See In re Barney's Will, 70 Vt. 352, 40 Atl. 1027 (1898); Snodgrass v. Smith, 42 Colo. 60, 94 Pac. 312 (1908); In re Cooper's Will (N. J. Prerog.) 71 Atl. 676 (1909). See, also, Downey v. Murphey, 18 N. C. 82 (1834), where the reason for the difference in the attitude of the ecclesiastical courts and that of the common-law courts is explained.

"The fact that an inference unfavorable to the validity of a will, which may be drawn when it appears that a person who was dependent upon or subject to the control of another (Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479 [1886]) makes a will in that other's favor, may be rebutted by showing that the transaction was fair and honest, does not change the question of whether or not it has been rebutted from one of fact to one of law. Whenever facts that would sustain the will are put in evidence, together with other facts from which an inference unfavorable to its validity may be drawn, the question of whether the unfavorable inference should be drawn, and, if so, whether it has been rebutted, are both questions of fact, for they are the same questions which arise on every motion to set a verdict aside as against the weight of evidence; and in this state the questions arising on such a motion are questions of fact." Young, J., in Edgerly v. Edgerly, 73 N. H. 407, 408, 62 Atl. 716, 717 (1905). For a discussion of the proper rule where a will is drawn by a beneficiary under it, see 71 Am. Dec. 129, note; 3 Am. Prob. Rep. 52, note; 15 Am. & Eng. Ann. Cas. 551, note. On the effect of gifts by will to one standing in fiduciary relationship to the testator, see 21 Am. St. Rep. 94, note; 5 Am. Prob. Rep. 590, note; 6 Prob. Rep. Ann. 300, note.

That the law raises a rebuttable presumption of undue influence when a ward makes a will in favor of her guardian is asserted in Re Cowdry's Will, 77 Vt. 359, 60 Atl. 141 (1905).

In Dudley v. Gates, 124 Mich. 448, 86 N. W. 959 (1901), in affirming the correctness of the trial court's charge to the jury on the question of the burden of proof, the upper court said: "We do not think that this charge, taken as a whole could have misled the jury. They were correctly told that the circumstance that the will was drawn by proponent's husband was a circumstance which raised a suspicion, and they could not have heard this charge without understanding that it was the duty of the proponent to remove this suspicion by evidence." See, also, In re Miller's Estate, 31 Utah, 415, 88 Pac. 338 (1906)

MAIN v. RYDER.

SAME v. MINER.

(Supreme Court of Pennsylvania, 1877. 84 Pa. 217.)

Mr. Justice MERCUR.[27] * * * 3. The fact[s] that the testator lived with a woman to whom he was not legally married, and that she and their illegitimate offspring were the devisees of much of his property, are urged as creating a presumption in law that the will was executed under improper influences. The case of Dean et al. v. Negley et al. [41 Pa. 312, 80 Am. Dec. 620] is cited to support this view. The opinion of the judge in that case expressly declares that the court does not decide such relations create a presumption of law of undue influence; but leaves the effect thereof as a question of fact for the jury. To the same effect is the case of Rudy v. Ulrich et al., 69 Pa. 177, 8 Am. Rep. 238. No clearly defined weight can be given to such testimony. Much must depend on the particular circumstances of each case. It is an element undoubtedly to be considered.

It appears that Miner had been entirely separated from his lawful wife and children for nearly thirty-five years. So far as it appears none of them had met him in all that time. She had not sought any reconciliation of her marital relations, nor they of their filial relations. They all resided in another state. She died in April, 1869. For more than twenty-six years the testator and the woman named in his will as his wife, had lived and cohabited together as husband and wife. During all that time they so recognized each other. She had borne him several children. To them he also devised a portion of his estate. A separation for more than thirty years from his legitimate children naturally weakened his parental affection towards them. It needed no special effort on the part of his other family, with which he had lived more than a quarter of a century, to make them the objects of his bounty. The court fairly submitted the fact of his illicit associations to the jury to consider in determining the question of undue influence. On the whole record we discover no sufficient cause for reversal; therefore, judgment affirmed in each case.[28]

[27] The statement of facts is omitted, and part only of the opinion is given.

[28] See Saxton v. Krumm, 107 Md. 393, 68 Atl. 1056, 17 L. R. A. (N. S.) 477, 126 Am. St. Rep. 393 (1908). On the effect of meretricious relations between testator and beneficiary on the validity of a devise or bequest, see 17 L. R. A. (N. S.) 477, note; 13 Prob. Rep. Ann. 455, note; and 21 Am. St. Rep. 99, 100, note. Compare the gift inter vivos case of Platt v. Elias, 186 N. Y. 374, 79 N. E. 1, 11 L. R. A. (N. S.) 554, 116 Am. St. Rep. 558 (1906).

"We are of opinion that * * * an influence when exercised by a wife might be lawful and legitimate, but which, if exercised by a woman occupying merely an adulterous relation to the testator, might be undue and illegitimate." Worden, C. J., in Kessinger v. Kessinger, 37 Ind. 341, 343 (1871). See, also, McClure v. McClure, 86 Tenn. 173, 6 S. W. 44 (1887).

"The existence of an illicit relation between a deceased testator and his mistress will not give rise to a presumption of undue influence as a matter of law;

HAYES v. MOULTON et al.

(Supreme Judicial Court of Massachusetts. Worcester, 1907. 194 Mass. 157, 80 N. E. 215.)

Appeal by Lizzie A. Hayes, executrix, from a decree of the probate court disallowing the will of one Susan H. West, an aunt of appellant. When the will was made Susan H. West was 77 years of age. The will was made on June 28, 1904, and testatrix died July 26, 1904. On June 13, 1904, testatrix sent for appellant and asked her to come to her. A day or two later testatrix stated to the appellant that she had sent for her to fix up her property, and asked the appellant what she should do. The appellant replied that she should advise dividing it equally between the nephews and nieces that the testatrix thought the most of. The testatrix replied that was just what she did not want to do, as she did not wish to have her property sold, whereupon the appellant said that, if her aunt wished, she would keep it just as it was and rent it. Subsequently the aunt executed the will giving the property to the appellant. In the superior court, before Judge John A. Aiken, the jury sustained the will, and respondents excepted.

The eleventh request for instructions was as follows: "A will which is different from the previously expressed purpose of the testatrix, and which is different from what it would have been if she had been in full possession of her faculties and had acted under independent advice, should be set aside." The court refused to give this.

The twelfth request was as follows: "The question of undue influence and mental capacity cannot be separated, where the testatrix was of advanced age and suffering from a disease affecting her brain and vital powers." This request was refused.

The nature of the other requests referred to in the opinion is stated in the opinion.

SHELDON, J.[29] * * * The eleventh request could not have been given in the form asked for. The fact that a will differs from the previously expressed purpose of the testatrix, or from what it would have been if, besides being in full possession of her faculties, she had acted under independent advice, does not require it to be set aside. She had the right to change her mind and to select her own advisers. And the

but undue influence is more readily inferred in case of a will made in favor of a mistress than in the case of a will in favor of a wife. The existence of the relation is a circumstance to be considered by the jury, along with the other facts in the case." Magruder, J., in Smith v. Henline, 174 Ill. 184, 196, 197, 51 N. E. 227, 231 (1898). See, also, Snell v. Weldon, 239 Ill. 279, 87 N. E. 1022 (1909); Weston v. Hanson, 212 Mo. 248, 111 S. W. 44 (1908). That such may be the rule, although prior to the will the testator marries his mistress, see Reichenbach v. Ruddach, 127 Pa. 564, 18 Atl. 432 (1889). But the period of the illicit relationship before marriage may be too remote to have any weight. Fulton v. Freeland, 219 Mo. 494, 118 S. W. 12 (1909).

[29] Part only of the opinion is given.

jury were sufficiently told that the will could not be sustained unless the petitioner proved that the testatrix was of sound and disposing mind and memory.[30] * * *

It would not have helped the jury to state to them the abstract proposition of law contained in the twelfth request. It is true of course, as argued by the respondents, that a person may have sufficient capacity to make a will if let alone and yet not be of sufficient capacity to resist the pressure upon him of strong influence; and the question whether the use of such influence is lawful or not often may depend, and perhaps in this case did depend, upon the condition of mind and body of the person upon whom it is exercised. Dexter v. Codman, 148 Mass. 421, 424, 19 N. E. 517; Bacon v. Bacon, 181 Mass. 18, 22, 62 N. E. 990, 92 Am. St. Rep. 397. But that is not what the judge was asked to say to the jury. He had a right to refuse this request. * * *

Exceptions overruled.

Appeal of HARRISON.

(Supreme Court of Errors of Connecticut, 1880. 48 Conn. 202.)

Appeal from the decree of probate court approving the will of Edward Harrison, deceased, brought to the superior court in New Haven county, and tried to the jury before Hitchcock, J. The jury returned a verdict setting aside the will, and the appellees moved for a new trial for error in the rulings and charge of the court, and on the ground that the verdict was against the evidence. The case is sufficiently stated in the opinion.

LOOMIS, J.[31] This appeal was from the decree of the New Haven probate court, approving the will of Edward Harrison, late of New Haven, deceased.

The testator was twice married. The appellant is a son by the first wife. The testator's last wife and his four children by her survive him; and to them the will gives all his property, to be equally divided, subject however to a bequest to one Ann Naughton, a servant in the family, of an amount sufficient to make her share equal to each of the other shares. To this Ann Naughton, the appellant attributes an undue influence over the testator in the making of his will, which rendered it invalid.

[30] "It is true that, where a will is charged to have been executed through undue influence, the declarations of the testator, made before its execution, are admissible by way of rebuttal to show his intention as to the disposition of his property, upon the ground that a will made in conformity with such declarations is more likely to have been executed without undue influence than if its terms are contrary to such declarations. But the declarations thus admissible are those which are in harmony with the provisions of the will actually made, and not those which are opposed to such provisions." Per Curiam, in Waters v. Waters, 222 Ill. 26, 35, 78 N. E. 1, 4, 113 Am. St. Rep. 359 (1906).

[31] Part only of the opinion is given.

The verdict of the jury sustained the claim of the appellant and the entire will was set aside. The question now comes before this court for review by the appellees' motion for a new trial, predicated on three grounds—namely: That the verdict was against the evidence, and that the court erred in its instructions to the jury, and that its rulings as to the admissibility of evidence were erroneous.

The consideration of the first question is unnecessary, as the other grounds are sufficient to require the granting of a new trial.

The appellees requested the court to charge the jury: "That a will may be void in part and valid in part; that if the jury should find that the legacy given to Ann Naughton by the provisions of the will was obtained by her undue influence, then the legacy only would be void, and not the remaining provisions of the will, unless the jury should further find that the undue influence extended to the other provisions of the will." But the court refused so to charge, and on this point instructed the jury as follows: "It is true that a will may be void in part, and in all other respects be valid; but, as this case stands, the question of the partial validity of the will is not presented, and has not been tried. The executor and all the parties claiming under the will are made parties by service of order of notice to this appeal [to the superior court from the probate court]. All have appeared, and have been fully heard by evidence, on the question raised by the reasons. No specific question, by way of reasons for the appeal, needed to be presented; but such reasons having been filed attacking the will as a whole, the evidence, on both sides, having been directed to that sole point, and the trial having proceeded throughout, up to the argument, solely on that question, the will, on such proceedings, must be sustained or be rejected as a whole."

That the request of the appellees embodies an accurate statement of the law is shown by many authorities. In Trimlestown v. D'Alton et al., 1 Dow. & Clark, 85, it was held that "where an undue influence is exercised over the mind of a testator in making his will, the provisions in the will in favor of the person exercising that influence are void; but the will may be good as far as respects other parties; so that a will may be valid as to some parts and invalid as to others; may be good as to one party and bad as to another." So in Florey's Executors v. Florey, 24 Ala. 241, it was held that "fraud or undue influence in procuring one legacy does not invalidate other legacies which are the result of the free will of the testator, but if the fraud or undue influence affects the whole will, though exercised by one legatee only, the whole will is void." So in 1 Redfield on Wills (4th Ed.) p. 519, § 20, it is said that "It is undoubtedly true that a will may be void in part and not in all its provisions; or it may be void as to one legatee and not as to others."

Further citations are quite unnecessary, if indeed any were required; for there was no controversy in the court below on this point.

But the court, while acknowledging the law as claimed by the appellees, refused to allow them the benefit of it in the case on trial, upon the idea that the question as to the partial validity of the will was not in issue, and that it was too late to make the claim upon argument.

In this respect the court erred. The issue was as to the fact of undue influence, and also and necessarily as to its nature, effect and extent.

Even where the pleadings are of the most technical character the greater, of necessity, includes the less. A charge of murder involves manslaughter as well. In ejectment, where the pleadings have sole reference to a specified tract of land as an entirety, any part within the boundaries may be recovered without the rest. So that, if tested by the strictest rules, the court was wrong. But the technical rules of pleading do not apply to issues on the trial of the validity of a will. Reasons of appeal are not necessary to form an issue, but when filed they constitute a notice to the adverse party of the matter relied upon. St. Leger's Appeal from Probate, 34 Conn. 434, 91 Am. Dec. 735.

The interests of different legatees are by law separate and distinct. The widow and children had a clear right to have the jury pass upon the question, whether the will of the testator was not entirely free from undue influence as to them and their legacies, and whether the undue influence had anything to do with the exclusion of the appellant from a share in the estate. There was evidence tending to show that the undue influence, if any, might have begun and ended with Ann Naughton, which the jury ought to have been permitted to consider. The question as to the effect of the undue influence, as shown by the evidence, was properly made in the argument. * * *

A new trial is advised.[32]

SECTION 7.—MISTAKE

GIFFORD v. DYER.

(Supreme Court of Rhode Island, 1852. 2 R. I. 99, 57 Am. Dec. 708.)

This was an appeal from a decree of the court of probate of Little Compton, proving and approving the last will and testament of Abigail Irish. The will was dated December 4, 1850, and the testatrix died December 6, 1850. After several bequests of small sums to the children of Robin Gifford and to others, she gives and bequeaths the rest

[32] See, to the same effect, In re Welsh, 1 Redf. Sur. 238 (N. Y.; 1849); Steadman v. Steadman (Pa.) 14 Atl. 406 (1888); Old Colony Trust Co. v. Bailey, 202 Mass. 283, 88 N. E. 898 (1909); Sumner v. Staton (N. C.) 65 S. E. 902 (1909). Compare In re Cooper's Will (N. J.) 71 Atl. 676, 680 (1909).

and residue of her property, one half to John Dyer, who was her brother-in-law, and the other half to her two nephews, Jesse and Alexander Dyer. Robin Gifford, the only child of the testatrix, was not mentioned in the will. It appeared in evidence, that at the date of the will, Robin Gifford had been absent from home, leaving a family, for a period of ten years, unheard from; that all the neighbors considered him dead, and that his estate had been administered upon as of a person deceased. The scrivener who drew the will, testified as follows: "After I had read the will to her, she asked if it would make any difference if she did not mention her son. I asked if she considered him living. She said she supposed he had been dead for years; she said, if it would make any difference she would put his name in, for they will break the will if they can. I think that was the expression she used. I think she said what she had given to her grandchildren was in lieu of what he would have, but am not positive. I think her son left in 1841, and was not heard of to my knowledge. She was speaking of a home at Mr. Dyer's and said, what she had given him would pay him well. She said her grandchildren had not been to see her while she was sick." It appeared that the testatrix had resided with John Dyer for some time previous to her death.

GREENE, C. J. It is very apparent in the present case, that the testatrix would have made the same will, had she known her son was living. She did not intend to give him anything, if living.

But if this were not apparent and she had made the will under a mistake as to the supposed death of her son, this could not be shown dehors the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy, upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void. Campbell v. French, 3 Vesey, 321.

WAITE v. FRISBIE et al. (two cases).

(Supreme Court of Minnesota, 1891. 45 Minn. 361, 47 N. W. 1069.)

GILFILLAN, C. J.[83] This is a contest over the will of Josephine O. Frisbie presented for probate. * * * One ruling at the trial involved the question whether, on the evidence, there was a case upon which a finding in favor of the will could be sustained. That was a request, refused by the court, that the jury be instructed to find a verdict in favor of contestants. After a careful examination of the evidence, we think the request ought to have been granted. Assuming the instrument to have been signed by the deceased or by another by her express direction, as required by the statute, still the instrument

[83] Part only of the opinion is given.

is not such an expression of her wishes as to be entitled to be regarded as her will. The circumstances were somewhat peculiar. Mrs. Frisbie was very ill and weak, so much so as to be unable to speak, or to indicate her wishes unless by gestures at the time of and for some minutes before the signing, and at the time of giving directions for the will she could barely speak. She was in a dying condition, and died within about 10 minutes after the signing. It is evident that when dictating what she desired put in the will, and while it was being prepared, and when presented to her for execution, she was supposed to be about to die. In such circumstances very great care is required to make sure that the instrument really expresses the will of the person signing, and not merely the inferences of the person drafting it, or of the bystanders, as to what the party's wishes are. Stating the evidence as strongly as possible in favor of the will, about an hour and a quarter before she died Mrs. Frisbie communicated to Mrs. Wiser, who was with her and remained with her to the end, her desire to make a will, and the disposition she desired to make of her property, and Mrs. Wiser stated these to Dr. Frisbie, the husband of deceased, and he wrote out accordingly as it was stated to him. The instrument he prepared in the form of a will, except the concluding clauses, contained five items, the first four making minor bequests to others, the fifth making him residuary legatee. The instrument was then read over to deceased, and she declined to sign it, because she desired in it a provision that, if her brother should come to want, she wanted the doctor (the residuary legatee) to take care of him. To prepare and insert such a clause a lawyer was sent for, and Mrs. Wiser informed him what Mrs. Frisbie desired, and he added, not in the precise words of the deceased, but in his own, expressing what he understood was desired, a sixth clause or paragraph. This clause did not change in any way the legal effect of the instrument as it was when deceased declined to sign it. It made no charge on the estate, and imposed no duty or liability on any one. It was merely a request to her husband to see that her brother was taken care of so as not to become a public charge, in case he should come to want. The clause was not read by, nor to her, nor was it explained to her. She was assured that what she desired about her brother was in the instrument, and then what is claimed as the signing took place. If it were clear that the words in which the sixth clause is expressed were her words,—that they were chosen by her, or adopted by her,—the instrument would be none the less her will, although the words did not effect the purpose she may have intended. But it is clear from the testimony of Mrs. Wiser, who received Mrs. Frisbie's instructions, and communicated them to the lawyer, that the language of the deceased was not inserted in the clause. The witness and the lawyer may have thought it substantially identical,—that it expressed the same idea. But the words of the clause are not the words of the deceased, nor, as the words of the latter are testified to by Mrs. Wiser, do they express the same idea.

The words to her indicate a desire on the part of the deceased to make a positive provision for her brother in the contingency mentioned, while the words of the clause make no such provision, but leave the matter of taking care of the brother to the option of the husband. * * * Order [granting a new trial] affirmed.[34]

IDDINGS v. IDDINGS.

(Supreme Court of Pennsylvania, 1821. 7 Serg. & R. 111.)

This was a writ of error to the court of common pleas of Union county, in which a feigned issue was tried, to determine the validity of a writing purporting to be the last will and testament of Henry Iddings, deceased.

The plaintiff having given evidence in support of the will, by the oaths of the two subscribing witnesses, one of whom was Jonas Candor, the scrivener who drew it, the defendants offered to prove, on the cross-examination of the said Candor, that through ignorance he had drawn the will in such a manner as to contradict the intention of the testator. The nature of the mistake was as follows: The testator's estate was principally personal; he had a number of children, to some of whom he had made advances in money, and it was his design to make an equal division of his property among them; in order to effect this, a legacy was given to each, which would have put them all on nearly an equal footing, supposing that the sums advanced to each were added to their legacy; but the scrivener inserted in the will a direction to the executors not to cancel any of the accounts between the testator and his children; the consequence of which would be that the children must account for the sums advanced to them, and then their provision would be very unequal. The mistake arose from the scrivener's ignorance of the meaning of the word cancel. It appeared that the testator was ninety-two years old, and had ten children. The defendants further offered to prove that one of the testator's children was not named in the will, and that the will was extorted from the testator by the importunity and hard usage of Thomas Iddings, one of his children. The court rejected this evidence, and the defendants excepted to their opinion.

Jonas Candor, the above-mentioned witness, having stated, on his examination, that the testator furnished him with the matter of the will, the defendants proposed to ask the witness what were the instructions given to him by the testator, and requested him to state them at large. The plaintiff objected to this testimony, and the court overruled it, and sealed a second bill of exceptions.

The verdict and judgment below were for the defendant in error, in favor of the will.

[34] See Christman v. Roesch, 132 App. Div. 22, 116 N. Y. Supp. 348 (1909).

TILGHMAN, C. J.[35] This may be a very unfortunate mistake for some of the children of the testator, but I am clearly of opinion that the evidence was not admissible. Our law requires that wills should be in writing, and proved by two witnesses. But if the writing is to be contradicted by parol evidence, the object of the law will be defeated and all certainty destroyed. It is very common for scriveners to make mistakes, particularly where they make use of technical words, which they are fond of doing. But, if these mistakes were to be corrected by the scrivener's recollection of his conversation with the testator, it would open such a door for perjury and confusion, as would render wills of very little use. The rule of law, therefore, is that the writing is not to be altered, or explained by evidence aliunde.

But this rule is not so unbending as to admit of no exception. It may happen, that expressions, apparently certain, may be rendered uncertain, by something peculiar in the person, or the subject to which they are applied. A man has two sons of the name of John, and devises land to his son John. The uncertainty is made to appear by parol evidence that there are two sons called John. It is permitted, therefore, to remove this uncertainty by other parol evidence, showing which son was intended. Without this evidence, the devise would be void, and, in truth, its object is to explain a doubt arising, not on the will, but on the matter out of the will. But, if a doubt should arise on the face of the will (an ambiguity patent as it is called), it is not to be explained by parol evidence. So, parol evidence has been admitted to rebut a resulting trust; neither is this in contradiction of the written will; the trust is not declared by the will, but raised by operation of law; the legal presumption may, therefore, be encountered by parol evidence of the testator's intention; but the written will is preserved, without addition or diminution. In the case of fraud, too, always the subject of the law's abhorrence, evidence is admitted, not for the purpose of explaining or altering the writing, but of showing it to be void. If, instead of the will which a man has read and intends to execute, another is substituted, which he executes, it is evident that this is not his will, and proof of this fraud is permitted. So, I apprehend, the truth might be shown, if, by mistake, the wrong paper was executed and the testator died before there was time to correct the error. These are, in general, the cases in which parol evidence is allowed, although I will not say that there may not be others.

Now, the case before us is very different from any I have mentioned, for there is no latent ambiguity, no fraud, no resulting trust. The will was read to the testator, and executed by him, without any kind of mistake or imposition as to the paper itself. The mistake, if there was one, was in the meaning of a very common word (cancel). I have mentioned the rule of law, and will refer to good authorities to prove it, although I shall not undertake the useless and endless labor of ex-

[35] Part only of the opinion is given.

amining all the cases in the books on the subject of parol evidence. The case of Brown v. Selwyn is strong to this point, and I select it, because it was affirmed by the House of Lords in England, and has been recognized by our courts. In that case (reported in Cas. temp. Talb. 240, and 4 Bro. P. C. 176, 186), the testator had devised the residue of his estate to his two executors equally, and it was offered to be proved, that he had given instructions to the person who drew his will, to release a debt due on bond from one of his executors, but the evidence was rejected. In the case of Mann and Others v. Mann and Others, 1 Johns. Ch. (N. Y.) 231, where the law on this subject of parol evidence is laid down with great learning and accuracy by Chancellor Kent, Brown v. Selwyn is cited and relied on, as it is also in Torbert v. Twining and Others, decided by this court in the year 1795 (1 Yeates, 432). The case of McDermott v. United States Insurance Company, 3 Serg. & R. 604, decided by us in 1818, adheres to the same principle of rejecting parol evidence, with the exceptions which I have mentioned. In short, it may be affirmed, without hesitation, that the current of authority runs strong in the same channel, although it cannot be asserted that all the cases are in unison. For my own part, being convinced by experience of the danger of parol evidence, I am more inclined to shut the door, than throw it wider open. I concur, therefore, with the opinion of the court below in the present instance.

But there is another bill of exceptions in this cause. * * *

My opinion is that in the second bill of exceptions there is error, and therefore the judgment should be reversed and a new trial ordered. Judgment reversed, and a venire facias de novo awarded.[36]

[36] See Comstock v. Hadlyme Ecclesiastical Society, 8 Conn. 254, 20 Am. Dec. 100 (1830).

"In a court of probate, it may doubtless be shown by parol evidence that the alleged testator, at the time of signing the instrument, did not understand that it was a will, or intend that it should operate as such. Swett v. Boardman, 1 Mass. 258 [2 Am. Dec. 16 (1804)]; Osborn v. Cook, 11 Cush. 532, 535 [59 Am. Dec. 155 (1853)]. But if, being of sufficient mental capacity, and free from insane delusion or undue influence, he executed the instrument with a knowledge of its nature and contents, and intending that it should be his last will, its admission to probate cannot be opposed by evidence that he did not understand the legal effect of all its provisions, or truly appreciate the proportions in which his property would be thereby distributed. To allow this to be done would be to defeat, by evidence of the most unsatisfactory and untrustworthy character, an instrument voluntarily executed by a competent testator with all the forms and solemnities which the statute makes essential to the validity of a testamentary disposition." Gray, J., in Barker v. Comins, 110 Mass. 477, 488, 489 (1872).

In a late English case, where the court was asked to strike out of a will a general revocation clause, and to probate with the will a prior will and codicil, the court said: "The last will contains words which in law revoke all previous wills. These words were inserted, as I have no doubt, because the testatrix misunderstood their meaning, and I have no doubt how she came to misunderstand their meaning. It is clear in the evidence that the person who drew the will was ignorant—there is no fraud—as to the effect of putting that clause in and doubly ignorant; for he told her it would be inoperative, and he told her, farther, if it was struck out, the rest of the will would be vitiated. Misinformed by this statement, she allowed the clause to remain. The question

MITCHELL v. GARD.

(Court of Probate, 1862. 3 Sw. & Tr. 75.)

Sir C. CRESSWELL gave the following judgment: [37] In this case the defendants propounded a will alleged to have been made by Mary Gregory, widow. The plaintiffs pleaded—first, that the will was not duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; thirdly, that the paper writing propounded was not the will of the deceased; fourthly, that the will was obtained by the undue influence of the defendant Gard.

Issues were joined on these pleas, and the cause came on for trial at the last assizes for Exeter, before Byles, J., when the jury found, first, that the will was duly executed; secondly, that the deceased was of sound mind, memory, and understanding; fourthly, that the will was not obtained by undue influence.

With regard to the third issue, the learned judge put certain questions to the jury suggested by the evidence, which, as far as that issue was affected, was as follows: The testatrix, on Tuesday, the 16th of September, in the morning, gave to the defendant Gard instructions for her will. She named several persons who were to be legatees, and the sums to be given to them respectively, and she made Gard residuary legatee. Gard directed his son, who was in practice as an attorney, to prepare a will according to those instructions, and to do it quickly. The son, in his haste, omitted the name of Triplett as one of the legatees. In the afternoon, Gard, the residuary legatee, took the will to the house of the deceased, and was soon afterwards followed by two medical men. One or more of the legatees named in the will were there, and some conversation took place about two or three other persons, and deceased said that she wished them to have a legacy of £5 each. Gard made a memorandum of this, and said it should be attended to; but the will was not altered. Soon after this all persons, except the two Gards (father and son) and the medical men, left the

is: Under these circumstances, can I strike it out consistently with the authorities? I am afraid I cannot. * * * Then Mr. Bray refers me to the case of Morrell v. Morrell [7 P. D. 68], and it seems to me that the language used in that case expresses the law which is applicable to this case, and expresses what is some reason for it, because the view of Lord Hannen in that case is this: That if a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed that technical language himself. Now, that view appears to me exactly to meet the present case. This lady thought it right to employ this gentleman to make her will for her; she thought it right to trust him. No doubt he was mistaken; but, according to the view of Lord Hannen, his mistake was her mistake. * * * Under these circumstances I feel bound to say that I am unable to strike these words out of the will, and probate will go of the will of October 17, 1889, with these words of revocation included. The will of 1875, with the codicil of 1885, will not be admitted to probate." Sir Francis Henry Jeune, President, in Collins v. Elstone, [1893] P. 1, 3–5.

[37] The statement of facts is omitted.

room. Gard then read over the will slowly and carefully to the deceased; she attended to it, and expressed herself satisfied. Neither she nor Gard noticed the omission of Triplett's name. The will was then duly executed by her, and attested by the medical men. The learned judge told the jury that an accidental and innocent deviation from instructions (as in the case of the legacy to Triplett) would not vitiate a will afterwards executed and rightly understood, or even executed by a competent testator; but, with reference to the omission of the other legacies, he asked the jury whether the instructions for them were present to Gard's mind at the time of the execution of the will, but absent from the mind of the testatrix, and he (Gard) knew them to be so; or whether the testatrix executed the will in the erroneous belief that those legacies had been given by the will, and Gard knew that she did so. The jury found that the testatrix had given instructions to Gard for legacies to Gillard, Perriam, and Egg; that at the time of the execution of the will those instructions were present to his mind; that they were absent from hers, and that he knew them to be so. The learned judge thereupon directed the verdict to be entered for the plaintiffs, on the third issue, giving to the defendants leave to move to enter it in their favor. A rule nisi for that purpose having been granted, cause was shown against it on the 15th of May, when the cases of Barry v. Butlin, 2 Moo. P. C. 480, and Mitchell v. Thomas, 6 Moo. P. C. 137, were cited to show that when a person prepares a will by which he is largely benefited, and the capacity of the testator is at all doubtful, it is necessary to prove that instructions were given by the testator, or that the will was read over to him, or that by some other means he was fully acquainted with its contents.

Those cases have no bearing on the question now to be determined, for the testatrix gave instructions for all that was in the will; it was read over to her, and the jury found that she was of sound mind, memory, and understanding. which is not now disputed. The real question is, whether that which she heard read, and approved, and executed, is or is not her will, because she forgot at the time that she had desired other legacies to be given, which were not inserted. Before the Statute 1 Vict. c. 26, many wills were brought under the consideration of the Prerogative Court, when it appeared that they did not contain all that the testator intended. The cases on the subject may be divided into two classes: one, where there was on the face of the will, as executed, some ambiguity or incongruity which indicated that something must have been omitted by mistake, and in them evidence was received of the testator's intention, and the omission supplied. The other class was where there was nothing on the face of the will to indicate that a mistake had been made, and the principle of law applicable to them was very clearly stated by Sir John Nicholl in Bayldon v. Bayldon, 3 Add. 232. He says: "Where a will has nothing doubtful or incongruous on the face of it, suggesting itself the probability of some casual error to account for this in the body of the will,

extrinsic evidence of the testator having meant other than the will expresses is inadmissible, as the court after and notwithstanding such evidence would still be bound to pronounce for the will." And again, in Shadbolt v. Waugh, 3 Hagg. 573, the same learned judge, with reference to an alleged omission, said, "It may be possible that the non-insertion escaped his observation when the will was read over, but that is not sufficient."

The omission of the legacies therefore did not prevent the will propounded from being the will of the deceased. There is nothing to show that at the time when it was executed she believed it to be other than it really was; as far as this question is concerned, I think it makes no difference whether the legacies were omitted by accident or intentionally, nor can it make any difference that Gard remembered the legacies, and knew that she had forgotten them. But also the will was executed by her intending that it should be her will; if her execution of it had been obtained by fraud, the case would be different. The knowledge of Gard may raise a suspicion against him, but fraud was not pleaded, nor do I learn from the learned judge's notes that it was imputed, nor was any question put to the jury on the subject.

The point reserved must therefore be determined apart from any presumption of fraud, and on the authority of the cases cited, as well as the reason of the thing, I am of opinion that the writing propounded was the will of the testatrix, and that the rule for entering a verdict for the defendants on the third issue must be made absolute.[38]

HARTER v. HARTER.

(Court of Probate, 1873. L. R. 3 P. & D. 11.)

Sir J. HANNEN.[39] In this case the plaintiffs, two of the executors of the will of the Rev. George Gardner Harter, deceased, dated the 6th of June, 1862, propound the said will, together with a codicil thereto of the 31st of August, 1863, and in their declaration allege that the word "real," which immediately precedes the word "estate" in the residuary clause of the will was inserted in the said residuary clause by error, contrary to the instructions of the testator, and was retained

[38] The English rule is that words inserted in a will by mistake may be stricken out, but that words omitted from a will may not be inserted. Goods of Louis Schott, [1901] P. 190. See Harter v. Harter, the next principal case.

In Newburgh v. Newburgh, 5 Mad. 364 (1820), a devise of lands in the counties of Gloucester and Sussex was by mistake copied as a devise of lands in the county of Sussex, and it was held that the mistake could not be corrected. In that case, "upon an appeal to the House of Lords, the judges were unanimous that the parol evidence could not be received, but the case was ultimately decided by the House upon the true construction of what still appeared on the face of the will." Sugden's Law of Property, 206.

Compare Stanley v. Stanley, 2 J. & H. 491 (1862).

[39] The statement of facts is omitted.

therein at the time of the execution of the will, without his knowledge or approval, and that by reason thereof the said word "real" is not entitled to be included in the probate. One of the defendants, Elizabeth Jessy Harter, the widow and remaining executrix of the will, has pleaded denying that the word "real" was inserted in the residuary clause by error, contrary to the instructions of the deceased, and that the said word "real" was retained therein without the testator's knowledge and approval, and a further plea that the will with the word "real" in the residuary clause was read over by and to the said testator, who was competent to, and did, understand the same; that the testator at the time of the execution of the said will knew and approved of the contents thereof as the same now appear; and, lastly, that the testator, after executing this said will, duly executed the codicil thereto, dated the 31st of August, 1863, and thereby confirmed, and, in law, re-executed his said will as the same now appears. These portions of the pleadings are sufficient to show the questions which arise for decision in the cause. By the settlement executed on the marriage of the deceased, he had, with his wife, a joint power of appointment of moneys, amounting on the whole to £65,000, for the benefit of one or more of his children. By a subsequent settlement certain freehold and copyhold hereditaments in the county of York stood at the time of the execution of the will in question limited to the use of the deceased and his assigns for life, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with divers remainders over. The deceased was also possessed of real estate of considerable value, and of personalty of the value of about £200,000. In this state of things, the deceased, on the 1st of May, 1862, after full explanation from his solicitor, Mr. Slater, of the position of affairs in reference to the said settlements, gave him oral instructions for the preparation of his will. Mr. Slater, in the presence of the deceased, wrote a memorandum of these oral instructions. The deceased also instructed him to prepare a joint appointment under the power in that behalf in the marriage settlement, and this was, as stated by Mr. Slater, part of the scheme the testator wished to be carried out in connection with his will.

The memorandum of the instructions for the will is before the court, and is as follows: "Give to wife, Elizabeth Jessy Hall, provisions, wines, liquors, carriages, horses, harness, live and dead stock in and about my dwelling-house and farm at Cranfield, except plate and furniture, with £1,000 legacy to wife absolutely. Set apart a sum sufficient to raise an annuity of £2,000 per annum to Mrs. Harter for life, with powers of investment. Give to Mrs. Harter the privilege of occupying, rent free, the house, outbuildings, garden, and pleasure-grounds at Cranfield Court, until eldest son for the time being shall attain twenty-five years of age, provided she so long remains my widow; and during such occupation of the house Mrs. Harter to have the use of the plate and furniture without liability to loss or breakage.

Limit (subject to interest in Cranfield Court given to Mrs. Harter) the Cranfield and other estates in Bedfordshire or Buckinghamshire, including the advowson of Cranfield, and the plate to like limitations as the Yorkshire estate, subject to previous trusts. Give furniture at Cranfield Court to eldest son for the time being on attaining twenty-five. Also give him £20,000 on attaining twenty-one. Give legacy of £10,000 to each of my daughters, Sophia Elizabeth, Jessy H., and Eleanor Maude H., on twenty-one or marriage. And the residue equally among all the sons, including the eldest for the time being, on attaining twenty-one. Maintenance, education, and advancement clauses during minority, as usual. Trustees and executors, my wife and my brother, James Collier Harter." Mr. Slater subsequently handed this memorandum to his managing clerk, Mr. Howarth, who drew up a draft will. In this draft the residuary clause is drawn in the following words: "And subject to the interests hereinbefore contained, upon further trust to stand possessed of all the residue and remainder of my real estate, in trust to divide the same equally between and amongst such of my sons now born or hereafter to be born (inclusive of my eldest son for the time being), as and when they shall severally attain their respective ages of twenty-one years, for their own use and benefit absolutely." A joint appointment providing for the equal division of the funds settled by the marriage settlement was also drawn up. On the 2d of May Mr. Slater handed to the deceased a fair copy of the draft for his perusal; and on the same day the draft of the joint appointment was also furnished to the deceased. On the 6th of May the deceased returned to Mr. Slater the draft will, as to which, after stating that he had carefully perused it, he suggested certain alterations. These were afterwards embodied in the draft in red ink, and the draft, so altered, was again returned to the deceased. Between this time, the 9th of May, and the execution of the will on the 6th of June, several letters passed between the deceased and Mr. Slater on the subject of the will, which clearly show that the deceased read and fully considered the will, and suggested an alteration in the residuary clause, by which the eldest son was to take a share equal to two of his brothers' shares; but no reference is made in the correspondence to the terms in which the residuary clause was worded, and it remained, with the exception of the above-mentioned alteration, as drawn in the first draft, and was so copied into the will, which was ultimately executed.

Mr. Howarth, the managing clerk to Mr. Slater, was called as a witness, and stated that he understood the word "residue" in the instruction, to mean "real and personal," but that by inadvertence he drew it as it now stands, and never noticed the error. Mr. Slater also stated that the terms of the residuary clause entirely escaped his attention. Upon the evidence afforded by the documents in the cause as well as by the oral testimony of the witnesses, I entertain no doubt that the residuary clause, as it stands in the will, does not express the

real meaning of the testator. It was not his intention that there should be an intestacy as to his residuary personalty, but that he intended that such residue should be divided amongst his sons, the eldest taking two shares. It is necessary that I should state what appears to me to have been the exact nature of the error by which a failure to express the true intention of the testator has arisen. I think that the error consists in the omission of the words "and personal" after the word "real" in the residuary clause. The memorandum of instructions drawn up by Mr. Slater, deals with realty as well as personalty, and then proceeds to dispose of the residue. This, without qualification, would mean the residue of the testator's property generally, real and personal; and so it was understood by Mr. Howarth, who drew the will. It makes no difference in my judgment, that the testator had not at the time any other realty than that which he had specifically disposed of. That fact may possibly have made him or Mr. Slater careless in the use of a general term wide enough to include realty, if it had existed, but it does not negative an intention on their part to use the word in its ordinary and more extended sense. There was no intention on the part of the testator to leave an intestacy as to any other real estate which he might possess or acquire, but in the belief that he had not and probably would not have any, he was content to use language wide enough to include it. Nor does the fact that the language of the residuary clause in disposing of the residue is rather applicable to personalty make any difference.

On this point the observations of Lord Cottenham in Saumarez v. Saumarez, 4 M. & Cr., at page 340, may be referred to. "The circumstances of the testator using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was not aware, that realty would be part of his residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property;" and again, at p. 339, "In considering gifts of residue, whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against a testator having overlooked some property or interest in the gifts particularly described." This view of the facts leads me to a conclusion which is decisive of the case. I think it is not in the power of the court to supply words accidentally omitted from a will. The Wills Act (1 Vict. c. 26, § 9) admits of no qualification. "No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned," that is, by a duly attested signature. In the present case there is no testamentary disposition of the residue of the personalty of the deceased fulfilling the requirements of the act, and the intention of the deceased, however clearly it may appear in the unattested instructions, cannot be given effect to. "With respect to wills

made on or after January, 1838," says Sir E. V. Williams (1 Wm. Ex'rs, 345, 6th Ed.), "it is plain that by reason of the provisions of the Statute 1 Vict. c. 26, the whole of every testamentary disposition must be in writing and attested pursuant to the act. Whence it follows that the court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends." This disposes of the numerous cases, which were cited in argument, of dates anterior to 1 Vict. c. 26; and with regard to wills to which that statute is applicable, it has not been suggested that the court can admit to probate any words not contained in some duly attested testamentary document, however cogent the evidence may be, from oral or written instructions, that they were intended to be part of the will.

But it was contended on behalf of the plaintiffs that the true view of the nature of the mistake in the draft and copy as executed is not that the words "and personal" were omitted, but that the word "real" was inserted, and that the will ought to be made to read "all the residue and remainder of my estate." I have already stated my grounds for holding that the error was one of omission, but there are further special reasons why I cannot expunge the word "real" from the residuary clause. There are undoubtedly numerous cases which establish that this court may decree probate of a part only of a properly attested instrument purporting to be a will. It is not necessary to do more than refer to the authorities collected in the case of Fawcett v. Jones, 3 Phillim. 434, which, though relating to wills before the Statute 1 Vict. c. 26, are on this head applicable to wills of a later date. And in the case of Allen v. McPherson, 1 H. L. C., at p. 209, Lord Lyndhurst said, "It is perfectly clear that the Ecclesiastical Court may admit part of an instrument to probate, and refuse it as to the rest." Lord Campbell (1 H. L. C., at page 233) in the same case says, "It is quite clear that the Ecclesiastical Court had jurisdiction to refuse probate of that part of the codicil which affects the appellant, because, giving credit to the facts stated, that part of the codicil was not the will of the testator; he was imposed upon, and probate of that part of the codicil ought to have been refused." In that case fraud was the ground on which it was sought to expunge a part of a codicil; but In the Goods of Duane, 2 Sw. & Tr. 590, Sir C. Cresswell applied the same reasoning to a case of simple mistake. There the words which were rejected were part of a printed form, and ought to have been struck out as inconsistent with the instructions given by the testator; they were not read by or to the testator, but the person who prepared the will omitted to strike them out. Sir C. Cresswell, after referring to Allen v. McPherson, said: "I can see no difference in principle between that case and the present one, where a clause for which the deceased gave no instructions, and which was not read over to him, formed per incuriam part of the document signed by the deceased."

The facts of that case distinguish it in an essential manner from the present. There an entire clause of which the testator was altogether

ignorant was introduced by accident, and it was contrary to the intention of the person who drew the will that the clause should be in it. In the present case the testator intended that a clause disposing of the residue of his personalty should be in the will, but he left it to another person to choose the language by which his intention should be carried into effect, and he read and adopted as his own the language so chosen. Inappropriate language having been used, the court is asked to remedy the mistake, not by rejecting words of which the testator is proved to have been ignorant, but by modifying the language used by the draftsman, and adopted by the testator, so as to make it express the supposed intention of the testator. This is, in fact, to make a new will. The theory of the plaintiffs, is that the testator had his personalty only in his mind, when he gave instructions for the residuary clause, because he had no realty undisposed of. If so, the proper mode of carrying out the instructions would have been to say, "the residue of my personal estate;" and in that case the error consists in having substituted the word "real" for "personal." Upon this hypothesis the court is asked to strike out the word "real," not because the clause would then be in the form the testator intended, but because it would in its transformed shape substantially carry out the testator's wish. It is also to be observed, that not only the form, but probably the effect would be different; for a bequest of the residue of the testator's estate would, according to the modern decisions, include the realty, unless the context clearly excluded it: Jarm. on Wills, c. 22; The Mayor and Corporation of Hamilton v. Hodsdon, 6 Moore, P. C. 76.

Such a mode of dealing with wills would lead to the most dangerous consequences; for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator. In very many of the cases which come before the courts of law and equity, as to the proper construction of wills, the intention of the deceased is supposed to be seen, but the question is whether the language used expresses the intention. If the process now sought to be applied to this will were to be adopted, the Court of Probate will in future be asked, first to ascertain by extrinsic evidence what the testator's intention was, and then to expunge such words or phrases, as, being removed, will leave a residuum, carrying out the intention of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended. If I felt myself at liberty to adopt such a course, I should think that the best amendment of the will would be to leave the word "residue" by itself in the residuary clause as it is in the memorandum of instructions. But it is obvious that, though this might give effect to the testator's wishes in this instance, it would be by an accident; for the word "residue," taken with the context of the will, might have had a different effect to that which it has in connection with the context of the instructions; but, for the reasons I have given, I entirely repudiate

this mode of altering the language of a testamentary instrument, and I am, therefore, of opinion that whether the error which has undoubtedly crept into the will be one of omission or insertion, it is equally beyond the jurisdiction of this court to correct it.

I have thus far considered the case, apart from the decision of Lord Penzance in Guardhouse v. Blackburn, Law Rep. 1 P. & D. 109, but I must add that it appears to me that that is an authority directly decisive of this case in favor of the defendants. It was there established to the satisfaction of the court that specific words had been inserted by the attorney who drew the codicil by mistake, and without instructions. Yet the learned judge held that as the contents of the codicil had been brought to the knowledge of a competent testatrix, the execution of the instrument must be deemed conclusive evidence that she approved as well as knew the contents. If I did not agree in the reasons given by Lord Penzance for his decision, it would be my duty to follow it in a similar case; but I must add, that I entirely adopt my predecessor's very lucid exposition of the rules by which this court ought to be governed with reference to the rejection of the whole or part of a duly executed testamentary document.

The conclusion I have arrived at makes it unnecessary that I should express a positive opinion on the effect which the execution of the codicil would have had on the will, if I had thought that the word "real" ought to be expunged from the residuary clause, but I am strongly inclined to think that it would have made no difference, and that the codicil must be held to confirm only that which was the true will of the testator. For these reasons I pronounce for the will in its present form.[40]

[40] "After much consideration, the following propositions commend themselves to the court as rules which, since the statute [the Wills Act] ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practiced on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole." Sir J. P. Wilde, in Guardhouse v. Blackburn, L. R. 1 P. & D. 109, 116 (1866).

MORRELL v. MORRELL.

(High Court of Justice, Probate Division, 1882. 7 P. D. 68.)

THE PRESIDENT (Sir JAMES HANNEN).[41] The findings of the jury have disposed of the whole matter. It appears that the testator intended to leave all his shares in a particular company to his nephews, and gave instructions to that effect to his solicitor, who embodied them in writing and sent them to a conveyancing counsel in London to draw the will. In those instructions the solicitor spoke, as he had been directed by the testator to speak, of "all" the testator's shares; but, by some accident not accounted for, counsel introduced into the draft will the word "forty" before "shares." Though the solicitor saw this, it never attracted his attention, and he never realized the effect the word "forty" would have on the disposition of the shares made by the testator. The jury have arrived at the conclusion that what the solicitor said on this subject was correct—that he never informed the testator in any way that the word "forty" had been introduced; and it was proved, by other evidence than that of the solicitor himself, that the actual will as executed was not read over to the testator. The jury found that the testator never authorized the introduction of the word "forty" in the will, and never heard that it had been introduced, and that he executed the will in the belief that it carried out his instructions. In the case of Harter v. Harter, L. R. 3 P. & D. 11, 22, I held that the language of a will could not be changed where the testator had seen the words and adopted them; but in Fulton v. Andrew, L. R. 7 H. L. 448, where a residuary bequest was introduced into a will without the knowledge and authority of the testator, the clause containing that bequest was rejected. If so, the same principle may be applied to a single word, and therefore, on the ruling of the House of Lords, in Fulton v. Andrew, I hold that the words may be struck out which had been introduced without the authority of the testator.

THE COURT directed that the word "forty" be struck out of the four places in which it occurred in the will, and, by consent of the parties, directed that the costs be paid by the plaintiffs.[42]

In re GOODS OF BOEHM

(High Court of Justice, Probate Division. [1891] P. 247.)

Motion for a grant of probate of a will with certain alterations.

The testator, Sir J. E. Boehm, R. A., died December 24, 1890, leaving a will duly executed bearing date December 12, 1889.

[41] The statement of facts and the instructions to the jury are omitted.

[42] In Goods of Thomas Duane, 2 Sw. & Tr. 590 (1862), Goods of Oswald, L. R. 3 P. & D. 162 (1874), and Goods of Sarah Sophia Moore, [1892] P. 378, clauses of revocation not read to or by the testator were omitted from probate. Compare Goods of Lady Isabella Gordon, [1892] P. 228.

The instructions for the preparation of the will were given to Mr. Mills, an old friend, who conveyed them to the testator's solicitor, by whom they were laid before counsel to prepare a draft will.

From the affidavits of these gentlemen it appeared that by his instructions the testator directed that two sums of £10,000 each, part of a specific sum of £24,000 dealt with in the will, should be set apart to be settled to the use and benefit of his two unmarried daughters, Miss Georgiana Boehm and Miss Florence Boehm, and their children, after the death of his wife, who was to have the life interest if she survived him. By inadvertence the conveyancing counsel in settling the draft inserted the word "Georgiana" in both the clauses of the will relating to the gifts to the unmarried daughters, and omitted the word "Florence" altogether; so that there were two gifts of £10,000 to Miss Georgiana Boehm, while Miss Florence Boehm was left totally unprovided for. This error was repeated in the engrossed copy of the draft which was ultimately executed by the testator. The draft of the will, together with an epitome of its provisions, were taken to the testator by Mr. Mills. The draft was never read over to him, but the epitome was. In the epitome the names "Georgiana" and "Florence" were accurately given, and the testator read it over and made corrections in it. The testator did not read the will over at the time of execution, and it was perfectly certain that his attention was not drawn to the mistake, which was only discovered after his death.

Jeune, J. I am asked to grant probate of the will of Sir Joseph Edgar Boehm with the word "Georgiana" omitted in two places, in what, on the face of the will, professes to be a gift in her favour. I had some doubt about deciding this matter on motion; but as representatives of all existing interests agreed to its being so decided, and future interests will be protected rather than prejudiced by this mode of dealing with this question, I see no objection to adopting it. It is clear from the evidence that the testator intended to give £20,000 in equal moieties to trustees for each of his daughters, Florence and Georgiana, and the instructions for the will correctly expressed this; but the draftsman, instead of inserting in the draft of the will a clause of gift in favour of Georgiana, and then a similar clause in favour of Florence, inserted the name of Georgiana in the second clause as well as in the first. It is proved that the testator did not read or have read over to him the will, but did read what professed to be an epitome of it, such epitome being in accordance with the instructions, and correctly representing the testator's intentions. In a sense, therefore, the word "Georgiana" was clearly inserted in the two places in question in error, though the real and complete mistake was in not inserting Florence in place of Georgiana. In view of the case of Morrell v. Morrell, 7 P. D. 68, following Fulton v. Andrew, Law Rep. 7 H. L. 448, and the earlier authority of In the Goods of Duane, 2 S. & T. 590, mistake is to be regarded as a question of fact depending on the circumstances of

each case, and there is now no difficulty, in circumstances such as those of the above cases, in striking out a clause, or a single word, if shewn to have been inserted by mistake. Indeed, in the present case no such difficulty occurs as arose in Fulton v. Andrew, Law Rep. 7 H. L. 448, in reference to the decisions in Atter v. Atkinson, Law Rep. 1 P. & D. 665, Guardhouse v. Blackburn, Law Rep. 1 P. & D. 109, and Harter v. Harter, Law Rep. 3 P. & D. 11, from a presumption of knowledge and approval arising from the reading of, or hearing read, a will by a competent testator, because here the evidence is that the testator, relying on the epitome, never read or heard the will read.

My difficulty at the argument was that, in the above cases, to strike out the word or words inserted in error left the will what the testator intended it to be. Here, to strike out the word "Georgiana" and to leave a blank in its place does not leave the will what the testator intended it should be, and I am not aware that there is any exact authority for striking a word out of a will under these circumstances. This case would seem to be the same as it would have been in Morrell v. Morrell, 7 P. D. 68, if the jury had found that the mistake consisted not merely in having put in the word "forty," but in not having put in the proper number, "four hundred," instead of "forty"—in fact, had answered the second question put to them differently from the way in which they did. The cases of In the Goods of Bushell, 13 P. D. 7, and In the Goods of Huddleston, 63 L. T. (N. S.) 255, refer, I think, only to the correction of clerical errors; and the language of the Judicial Committee in Rhodes v. Rhodes, 7 App. Cas. 192, points to the difficulty of rejecting words where their rejection alters the sense of those which remain.[43] But I think that the application of the principle of striking out a word clearly inserted in mistake may be safely extended, if it be an extension, to a case where the effect of its rejection may be to render ambiguous, or even insensible, a clause of which it formed part. If a person by fraud obtained the substitution of his name for that of another in a will it would be strange if his name could not be struck out, although the rest of the clause in which it occurred became thereby meaningless. It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike

[43] "A much more difficult question arises where the rejection of words alters the sense of those which remain. For, even though the court is convinced that the words were improperly introduced, so that, if the instrument were inter vivos, they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will, after its sense is thus altered, as valid within the ninth section of St. 7 Wm. IV & 1 Vict. c. 26; the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning." Lord Blackburn, in Rhodes v. Rhodes, 7 App. Cas. 192, 198 (1882).

out a name inserted in error and leave a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions. I am, therefore, willing to grant probate of this will as prayed with the omissions specified.

BRISCO v. BAILLIE HAMILTON.

(High Court of Justice, Probate Division. [1902] P. 234.)

Suit for revocation of probate, and for a fresh grant omitting certain words.

The will of testatrix contained, among other things, a devise of "all that my undivided moiety of and in certain manors, farms, lands, and hereditaments" in certain parishes in the county of Lincoln. These estates belonged entirely and absolutely to the testatrix as surviving joint tenant under her father's will. The plaintiff as devisee claimed that the deceased did not know and approve of the words "my undivided moiety of and in" contained in the will; that she gave no instruction for their insertion; that they were never read over or explained to her; and that, if they were read over by or to or were explained to her, she did not understand their meaning, and was not aware of their nature and effect. The plaintiff therefore claimed probate omitting these words.

If the devise now in question were held to carry only a moiety of the Lincolnshire estates, or if the devise were held to carry no part thereof to the plaintiff and his family, the remaining moiety or the whole of those estates, as the case might be, would appear to pass under the residuary devise of real estate to Mrs. Arbuthnot (the fourth-named defendant) and her family.

It appeared from the evidence of Mr. Charles Edward Jones, the family solicitor, that the draft of the will, instructions for which were given in 1892, was sent to the testatrix in July of that year; that she retained it till March, 1893; and that she then took it to the solicitor with directions as to certain alterations which she desired. There was, however, no evidence that she had, in fact, ever read over, or had read over to her, either the draft or the will; and a letter from the solicitor to the testatrix was put in, from which the contrary might be inferred.

JEUNE, P.† No doubt, if it can be proved that a will has been really brought to the mind of a testator or testatrix, and has been duly executed, it is difficult—perhaps impossible—in law to hold that anything contained in the will is a mistake. But, as was pointed out by the House of Lords in Fulton v. Andrew, [1875] L. R. 7 H. L. 448, the question is still left open whether the will was or was not really brought to the notice of the testator or testatrix. That question is a

†The statement of facts is rewritten and abbreviated.

question of fact depending upon the circumstances of the particular case. In the present case I am satisfied that the particular portion of the will before me was not brought to the knowledge of the testatrix in such a way that she must be assumed to have confirmed it by her subsequent execution of the will. From the evidence before me, I have no doubt that a mistake was made by the insertion of the words now in question; and, although it is quite true that the draft was sent to the testatrix, it was accompanied by a letter from the solicitor which in effect stated that there had been no material departure from the terms of the sister's will, upon which it was modelled.

Taking those facts, together with the language of the document itself, it is, to my mind, clearly shown that the testatrix never intended to impose any limitation or restriction upon the particular bequest; and if a jury were asked the question they would decide without hesitation that the portion of the will in question was not approved by the testatrix. I therefore consider it my duty to hold that those words do not form part of the will of the testatrix. I revoke the original probate, and decree a fresh grant of probate with the omission of those words.[44]

In re GOODS OF BUSHELL.

(High Court of Justice, Probate Division, 1887. 13 P. D. 7.)

Samuel H. Bushell, late of Worcester Park, in the county of Surrey, died June 8, 1887, leaving a will duly executed dated November 27, 1885. The will was prepared by his solicitor from his instructions, which were read over to him and fully explained, and on November 26, 1885, he executed a draft, which was also read over to him. When the engrossment of the draft was brought to him next day, he asked whether it corresponded with the draft, and being assured that it did,

[44] In Fulton v. Andrew, L. R. 7 H. L. 448 (1875), where the jury found that the testator did not know and approve of the contents of the residuary clause of the will, though he did know and approve of the rest, and the House of Lords remitted the case to the Court of Probate with directions to grant such probate, with the residuary clause left out, as might be right, Lord Cairns, in refusing to assent to the argument that a testator who reads the will he signs, or has it read to him, necessarily knows the contents, said (pages 460, 461): "It is said that it has been established by certain cases to which I will presently refer that in judging of the validity of a will or of part of a will, if you find that the testator was of sound mind, memory, and understanding, and if you find, farther, that the will was read over to him, or read over by him, there is an end of the case; that you must at once assume that he was aware of the contents of the will; and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords, I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the Legislature has, in the shape of an act of Parliament, distinctly imposed that rule."

he did not require it to be read over to him, but executed it without further examination. Among other bequests in the will was a legacy of £5,000 to the "British" Royal Infirmary, but in the executed draft the bequest was to the "Bristol" Royal Infirmary, which it appeared from the affidavits expressed his real intention.

B. Deane, moved for probate with the substitution of the word "Bristol" for "British."

BUTT, J. I see no reason why the alteration should not be made. I will grant probate with the word "Bristol" inserted, instead of the word "British," on the production of an affidavit that there is no such institution as the "British" Royal Infirmary.[45]

[45] This case was disapproved in In the Goods of Louis Schott, [1901] P. 190, where Jeune, P., stated that the registrar informed him that Sir James Hannen, who was President at the time, refused to allow the order of Butt, J., in In the Goods of Bushell, supra, to be carried into practice. Jeune, P., said during the argument of In the Goods of Louis Schott: "I can strike out words, but I cannot insert anything."

The question is really one of the use of extrinsic evidence in the interpretation of provisions in a will. While the question is one in the law of evidence, a mention of some of the problems is needed here.

"In the case of adverse claimants of the same gift, the following rules apply:

"1. If one (being competent to take) alone precisely answers the whole designation of the will, or is identified by the context, extrinsic evidence that the other was intended is incompetent.

"2. If both precisely answer the whole designation and indications of the will, a latent ambiguity or 'equivocation' is presented, and extrinsic evidence is competent; and in this class of cases, direct evidence of the testator's intention, even by proving his declarations of purpose, is admissible.

"3. If neither precisely answers the designation and indications of the will, but both do so approximately, this is also a case of latent ambiguity, admitting extrinsic evidence; and in this class of cases, too, according to the better opinion, the testator's declarations of intent may be proved."

Abbott's Trial Evidence (2d Ed.) 179.

But as to proposition 1, supra, see the argument in 4 Wigmore on Evidence, § 2462, against the rule that you cannot disturb a plain meaning. The theory of the rule is there declared to be unsound because "The ordinary standard, or 'plain meaning,' is simply the meaning of the people who did not write the document. The fallacy consists in assuming that there is or ever can be some one real or absolute meaning. In truth, there can be only some person's meaning; and that person, whose meaning the law is seeking, is the writer of the document." Id. And on the question of the policy of the rule it is stated that: "The truth is that whatever virtue and strength lies in the argument for the antique rule leads, not to a fixed rule of law, but only to a general maxim of prudent discretion." Id. And the author concludes: "There is, then, neither in theory nor in policy any basis for an absolute rule declaring that when a word has a 'plain meaning'—i. e., by the popular standard—neither the local nor the mutual nor the individual standard can be substituted. Such a rule is still maintained by many utterances like those above quoted. But its vogue is disappearing." Id.

For an extreme case supporting proposition 1, quoted supra from Abbott's Trial Evidence, see Union Trust Co. v. St. Luke's Hospital, 74 App. Div. 330, 77 N. Y. Supp. 528 (1902), affirmed in 175 N. Y. 505, 67 N. E. 1090 (1903). That case might have been deemed to fall under proposition 3, supra; but in any event Faulkner v. National Sailors' Home, 155 Mass. 458, 29 N. E. 645 (1892), would seem to be a sounder decision.

In Tilton v. American Bible Society, 60 N. H. 377, 49 Am. Rep. 321 (1880), which came under proposition 2, supra, Doe, C. J., for the court, said: "The question is not by what name any Bible Society was known to others, but

PATCH v. WHITE.

(Supreme Court of United States, 1886. 117 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860.)

BRADLEY, J. Ejectment for two undivided thirds of a lot of land in Washington city, known on the plats and ground-plan of the city as lot No. 3, square 406, fronting 50 feet on E street north. Plea, not guilty. The plaintiff, John Patch, now plaintiff in error, claims the lot under Henry Walker, devisee of James Walker. The latter died seised of the lot in 1832, and by his last will, dated in September of that year, devised to Henry Walker as follows, to-wit: "I bequeath and give to my dearly-beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging." The testator did not own lot No. 6 in square 403, but did own lot No. 3, in square 406, the lot in controversy; and the question in the cause is whether the parol evidence offered, and by the court provisionally received, was sufficient to control the description of the lot so as to make the will apply to lot No. 3, in square 406. The judge at the trial held that it was not, and instructed the jury to find a verdict for the defendant. The court, in general terms, sustained this ruling, and rendered judgment for the defendant, and that judgment is brought here by writ of error for review upon the bill of exceptions taken at the trial.

The testator at the time of making his will, and at his death, had living a wife, Ann Sophia, an infant son, James, a mother, Dorcas Walker, three brothers, John, Lewis, and Henry, (the latter being only eleven years old,) and three sisters, Margaret Peck, Louisa Ballard, and Sarah McCallion, and no other near relations, and all of these are provided for in his will if the change of description of the lot given to Henry is admissible; otherwise Henry is unprovided for, except in a residuary bequest of personal property in connection with others. The following are the material clauses of the will: After expressing the ordinary wishes and hopes with regard to the disposal of his body and a future life, the testator adds: "And touching wordly estate, wherewith it has pleased Almighty God to bless me in this life, I give, devise,

which one of several Bible Societies was intended by the testator. The testamentary name, or other testamentary description, of a legatee (whether an individual or a society, incorporated or unincorporated), is evidence of the testator's intention. Evidence showing what name was given to a Bible Society in its charter, what name it used or recognized as its own, and by what name or names it was known to others, tends to prove a name by which the legatee might have been known to the testator, and a name which he might have used in his will to express his intention. But the society intended by him, and identified by competent evidence, is the legatee, by whatever name described in the will, and notwithstanding any other name or names by which it may have been invariably or usually known to others. * * * A person known to the testator as A. B., and to all others as C. D., may take a legacy given to A. B." 60 N. H. 382, 383, 49 Am. Rep. 321. Compare In the Goods of William Wrenn, [1908] 2 Ir. R. 370.

and dispose of the same in the following manner and form." He then gives and bequeaths to his wife one-third of all his personal estate, forever, and the use of one-third of his real estate for life, remainder to his infant son, James. He then proceeds:

"I bequeath and give to my dear and affectionate mother, Dorcas Walker, forever, all of lot numbered seven, in square one hundred and six, as laid down on the plan of the city of Washington, together with all the improvements thereon erected and appurtenances thereto belonging.

"I bequeath and give to my dearly-beloved brother John Walker, forever, all of lot numbered six, in square one hundred and six, with the two-story brick house, back building, and all appurtenances thereto belonging.

"I bequeath and give to my dearly-beloved brother, Lewis Walker, forever, lots twenty-three, twenty-four, and twenty-five, in square numbered one hundred and six, together with a two-story brick building, with a basement story back building, and all appurtenances thereto belonging and erected on one or more of said lots.

"I bequeath and give to my dearly-beloved brother Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging."

Then, after giving to his three sisters and his infant son, respectively, other specific lots, with houses thereon, he proceeds as follows:

"I also bequeath and give to my infant son, James Walker, forever, the balance of my real estate believed to be and to consist in lots numbered six, eight, and nine, with a house, part brick and part frame, erected on one of said lots, in square one hundred and sixteen; lots thirty-one, thirty-two, and thirty-three, in square numbered one hundred and forty, and a slaughter-house erected on one of said lots; lots numbered eight and eleven, in square numbered two hundred and fifty; and lot numbered twenty-eight, in square numbered one hundred and seven; and, further, I bequeath and give to my infant son, James Walker, one thousand dollars, to be paid out of my personal estate, and applied at the discretion of his guardian hereinafter appointed, for the education of my son, James Walker."

He then adds:

"The balance of my personal estate, whatever it may be, I desire shall be equally divided between my mother, Dorcas Walker, my sister Sarah McCallion, and my brothers, Jno., Lewis, and Henry Walker."

It is clear from the will itself:

(1) That the testator intended to dispose of all his estate.

(2) That he believed he had disposed of it all in the clauses prior to the residuary clause, except the specific lots thereby given to his son.

(3) That when he gave to his brother Henry lot number 6, in square 403, he believed he was giving him one of his own lots. On general principles he would not have given him a lot which he did not own;

and he expressly says: Touching worldly estate, wherewith it has pleased Almighty God to bless me in this life, I give, devise, and dispose of the same in the following manner."

(4) That he intended to give a lot with improvements thereon erected.

Now, the parol evidence discloses the fact that there was an evident misdescription of the lot intended to be divided. It shows—First, as before stated, that the testator at the time of making his will, and at the time of his death, did not, and never did, own lot 6, in square 403, but did own lot 3, in square 406; secondly, that the former lot had no improvements on it at all, and was located on Ninth street, between I and K streets, while the latter, which he did own, was located on E street, between Eighth and Ninth streets, and had a dwelling-house on it, and was occupied by the testator's tenants,—a circumstance which precludes the idea that he could have overlooked it.

It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind,—whether lot 3, square 406, which he owned, and which had improvements erected thereon, and thus corresponded with the implications of the will, and with part of the description of the lot, and rendered the devise effective; or lot 6, square 403, which he did not own, which had no improvements thereon, and which rendered the devise ineffective.

It is to be borne in mind that all the other property of the testator except this one house and lot was disposed of to his other devisees,—at least, that was his belief as expressed in his will, and there is no evidence to the contrary; while this lot (though he believed he had disposed of it) was not disposed of at all, unless it was devised to his brother Henry, by the clause in question. In view of all this, and placing ourselves in the situation of the testator at the time of making his will, can we entertain the slightest doubt that he made an error of description, so far as the numbers in question are concerned, when he wrote or dictated the clause under consideration?

What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees. Did such a lot exist? If so, what lot was it? We know that such a lot did exist, and only one such lot in the world, and that this lot was the lot in question in this cause, namely, lot number 3, in square 406. Then is it not most clear that the words of the will, "lot numbered six, in square four hundred and three," contained a false description? The testator, evidently by mistake, put "three" for "six," and "six" for "three," a sort of misspeech to which the human mind is perversely addicted. It is done every day even by painstaking people. Dr. Johnson, in the preface to his Dictionary, well says: "Sudden fits of inadvertence will surprise vigilance, slight avo-

cations will seduce attention, and casual eclipses of the mind will darken learning." Not to allow the correction of such evident slips of attention, when there is evidence by which to correct it, would be to abrogate the old maxim of the law, "falsa demonstratio non nocet."

It is undoubtedly the general rule that the maxim just quoted is confined in its application to cases where there is sufficient in the will to identify the subject intended to be devised independently of the false description, so that the devise would be effectual without it. But why should it not apply in every case where the extrinsic facts disclosed make it a matter of demonstrative certainty that an error has crept into the description, and what that error is? Of course the contents of the will, read in the light of the surrounding circumstances, must lead up to and demand such correction to be made.

It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject; as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator.

The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances or declarations of the testator. 1 Jarm. Wills, 370; Hawk. 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out and enough remain in the will to identify the person or thing, the court will deal with it in that way, or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will. 1 Jarm. Wills, 364, 365; 1 Roper, Leg. (4th Ed.) 297; 2 Williams, Ex'rs, 988, 1032.

Mr. Williams (afterwards Mr. Justice Williams) says: "Where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified * * * (1) by the context of the will; (2) to a certain extent by parol evidence. * * * A court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family or affairs, for the purpose of enabling the court to identify the person intended by the testator." Page 989. Again, he says on page 1032: "Mistakes in the description of legacies, like those in the description of leg-

atees, may be rectified by reference to the terms of the gift and evidence of extrinsic circumstances taken together. The error of the testator, says Swinburne, in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain; as, for instance, the testator bequeaths his horse Criple when the name of the horse was Tulip, this mistake shall not make the legacy void, for the legatory may have the horse by the last denomination; for the testator's meaning was certain that he should have the horse. If, therefore, he hath the thing devised, it is not material if he hath it by the right or the wrong name." See, also, Roper, Leg. 297.

The rule is very distinctly laid down by Sir James Wigram, who says: "A description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so to enable a court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases the substance of the subject intended is certain, and if there is but one such substance, the superadded description, though false, introduces no ambiguity, and as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary, or add to the effect of the will by rejecting them." Wig. Wills, 53. Of course when the author speaks of the rejected words as being "inapplicable to any subject," he means inapplicable because the subject is not in existence or does not belong to the testator.

The case of Roman Catholic Orphan Asylum v. Emmons, 3 Bradf. Sur. 144, which arose before the surrogate of New York, well illustrates the application of the rule. There a testatrix bequeathed her shares of the Mechanics' Bank stock to the orphan asylum. She had no bank stock except 10 shares of the City Bank. Surrogate Bradford, in a learned opinion, held that the word "mechanics" must be rejected as inapplicable to any property ever owned by the testatrix, and the rejection of this word left the bequest to operate upon any bank stock possessed by her, and so to pass the City Bank shares. See, also, a learned note of Chief Justice Redfield, 10 Am. Law Reg. (N. S.) 93, to the case of Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665, in which he strongly disapproves the decision in that case.

Chief Justice Marshall in Finlay v. King's Lessee, 3 Pet. 377 (7 L. Ed. 701), lays down the general rule that underlies all others. "The intent of the testator," says he, "is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence."

But it is not our intention to review or classify the decisions. They are legion. The intrinsic difficulty of stating the rule as applicable to all cases is such as to make it presumptuous in any one to attempt to chain it down and fix it in the form of a verbal definition. Sufficient appears from the authorities already quoted to show that while no bill in equity lies to reform a will, because its author is dead, and his intent can only be known from the language he has used, when applied to the circumstances by which he was surrounded, yet a careful study of that language and of those circumstances will generally disclose any inadvertency or mistake in the description of persons or things, and the manner in which it should be corrected, without adding anything to the testator's language, and thereby making a different will from that left by him. We will only quote further an observation of Chief Justice Thompson, of New York, in Jackson v. Sill, 11 Johns. 201, 6 Am. Dec. 363, which is very pertinent to the present discussion. In that case the court rejected the extrinsic evidence offered to remove a supposed latent ambiguity in a will for the very good reason that it appeared, on examination, that no ambiguity existed. But the Chief Justice justly said: "It is undoubtedly a correct rule in the construction of wills to look at the whole will for the purpose of ascertaining the intention of the testator in any particular part, where such part is ambiguous. But where the intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper." Of course, in the case of a latent ambiguity, such repugnancy can only appear by means of the evidence which discloses the ambiguity.

In view of the principles announced in these authorities, the case under consideration does not require any enlargement of the rule ordinarily laid down, namely, the rule which requires in the will itself sufficient to identify the subject of the gift, after striking out the false description. The will on its face, taking it all together, with the clear implications of the context, and without the misleading words "six" and "three," devises to the testator's brother Henry, in substance as follows: "I bequeath and give to my dearly-beloved brother Henry Walker, forever, lot number ———, in square four hundred and ———, together with the improvements thereon erected and appurtenances thereto belonging, being a lot which belongs to me, and not specifically devised to any other person in this my will."

In view of what has already been said there cannot be a doubt of the identity of the lot thus devised. It is identified by its ownership, by its having improvements on it, by its being in a square the number of which commenced with four hundred, and by its being the only lot belonging to the testator which he did not otherwise dispose of. By merely striking out the words "six" and "three" from the description in the will as not applicable (unless interchanged) to any lot which the testator owned; or, instead of striking them out, supposing them to have been blurred by accident so as to be illegible,—the residue of the

description, in view of the context, so exactly applies to the lot in question that we have no hesitation in saying that it was lawfully devised to Henry Walker.

The judgment is reversed, and the cause remanded, with directions to award a new trial.[46]

In re MEYER'S ESTATE.

(High Court of Justice, Probate Division. [1908] P. 353.)

Fanny Deborah Meyer and her sister, Emilie Meyer, for many years resided together, keeping a joint establishment.

Some time before March, 1907, they, not for the first time, executed mutual wills.

On March 4, 1907, their solicitor went to their house by request and took instructions from both of them to make codicils to their respective wills in similar terms, and he made a note of these instructions on the original paper whereon he had taken instructions for their wills.

After the death of one of the sisters it was discovered, on opening the envelope containing the will of the deceased, that she had executed

[46] The dissenting opinion of Woods, J., in which three other Justices concurred, is omitted. The end of that opinion was as follows:

"Our conclusion is therefore that, as the evidence offered and rejected was for the purpose of explaining a latent ambiguity when there was no ambiguity, either latent or patent, it was properly rejected.

"The opinion of the court in this case allows what seems to us to be an unambiguous devise to be amended by striking out a sufficient description of the premises devised, and the blank thus made to be filled by ingenious conjectures based on extrinsic evidence. This is in the face of the statute of frauds in force in the District of Columbia, where the premises in controversy are situate. Fifty years after the unequivocal devise in question, as written and executed by the testator, had, as required by law, been placed upon the records of the District for the information of subsequent purchasers and incumbrancers, it is allowed to be erased, and, by argument and inference, a new one substituted in its place. This is not construing the will of the testator; it is making a will for him. The decision of the court subjects the title of real estate to all the chances, the uncertainty, and the fraud attending the admission of parol testimony, in order to give effect to what the court thinks was the intention of the testator, but which he failed to express in the manner required by law."

The cases pro and contra are collected in 6 L. R. A. (N. S.) 942, note. See, also, 4 Wigmore on Evidence, § 2477.

In Collins v. Capps, 235 Ill. 560, 85 N. E. 934, 126 Am. St. Rep. 232 (1908), the court, while not retracting Kurtz v. Hibner, cited in the principal case, and the cases which follow Kurtz v. Hibner, rejected the word "west" in the description "west half" of a quarter section, and thereby let a specific devisee take the north half of that quarter section. In Collins v. Capps the rule is stated that repugnant elements in a description may be rejected, and if a "sufficient description then remains, when interpreted in the light of surrounding circumstances, to identify the land, the devise will be given effect," but that the court has "no power to reform a will or correct a mistake therein by inserting or changing words." 235 Ill., at page 565, 85 N. E., at page 936. See, also, Gano v. Gano, 239 Ill. 539, 88 N. E. 146, 22 L. R. A. (N. S.) 450 (1909).

the codicil intended for her sister, and the sister had executed the codicil intended for the deceased.

Although two solicitors and an articled clerk were present when the documents were executed, no one appeared to have noticed the mistake. The solicitors who then acted for the deceased and her sister, and who had been their solicitors for many years, were not the solicitors now retained and instructing counsel.

The Court was moved to grant probate of the will and codicil, omitting from the latter the names of the testatrix and her sister wherever mentioned therein.

The surviving sister, who was the residuary legatee under the will of the deceased, consented to the motion.

Sir Gorell Barnes, President. It is unfortunate that such a difficulty as this has arisen, especially having regard to the fact that a solicitor's clerk witnessed the document. But it is quite clear that this lady, though her signature is on the document, never meant to sign this particular codicil at all. She meant to sign a totally different document. It may be that this document contains provisions corresponding with what she wished to sign, because the two documents were cross-codicils by two sisters. But, as a matter of fact, the deceased in signing her name to this codicil never intended to do that at all, but intended to put her signature to another document; and, unless some authority can be produced to me to shew that in such a case the document she did not intend to sign is to be treated as the one she did intend to sign, I do not mean to support it. In my opinion this codicil cannot stand. The will, of course, can be proved in the ordinary way. The lady who takes the chief benefit under the will, and whose interest would be diminished somewhat by the codicil, might very well carry out her deceased sister's wishes by allowing the money which the deceased wished to dispose of by the codicil to be paid out before taking her interest under the will. She is, I understand, executrix under the will; and, though she does not want the inconvenience of taking probate, she can do so and appoint somebody to manage the matter for her.[47]

In re KELSEY. WOOLLEY v. KELSEY. KELSEY v. KELSEY.

(Supreme Court of Judicature, Chancery Division. [1905] 2 Ch. 465.)

Swinfen Eady, J.[48] Erroneous recital [of advancement] cases may be divided into two classes.

In class 1 the testator by apt words directs a legatee to bring a particular sum into hotchpot. He may recite erroneously that a particular sum has been advanced, and direct the legatee to bring that sum,

[47] See In the Goods of Hunt, L. R. 3 P. & D. 250 (1875); Nelson v. McDonald, 61 Hun, 406, 16 N. Y. Supp. 273 (1891).

[48] The statement of facts is omitted.

or the sum "hereinbefore recited to have been advanced," into hotchpot, or he may by other appropriate language shew an intention that the legatee shall absolutely and in any event bring the sum mentioned into hotchpot—in other words, that the legatee shall only take upon the footing of bringing that particular sum into account, and only receiving the balance payable to him on that footing.

In class 2 the testator recites the debt owing from the legatee—again he may recite it erroneously—and then directs the debt, "or so much thereof as shall remain unpaid" at the testator's death or the time of distribution, to be deducted and brought into account. In cases of this class the testator really intends that there shall be brought into account the debt or balance thereof which is actually owing at the time of death or distribution.

The question is within which class the present case falls. In my judgment the present case more nearly resembles In re Taylor's Estate, 22 Ch. D. 495, 500, a decision of the Court of Appeal, and properly falls within class 2, and Stanley is only bound to bring into account the sum really owing. The testator upon the face of the will shows an intention to benefit Stanley. After reciting that his son Stanley is indebted to him in the sum of £5,000, and that he is desirous of reducing the amount in which Stanley is so indebted to him to £3,000, the testator forgives him £2,000, part of the £5,000, leaving £3,000 remaining owing. Now it appears in fact that no £5,000 had been advanced or was owing at all, but that the only sum advanced by the testator to Stanley was a sum of £80 paid for an indenture of apprenticeship when he was a lad of fifteen. It is suggested that the testator intended advancing the £5,000 to set up Stanley in business. That is only Stanley's account, and the solicitor who drew the will has no recollection of telling Stanley anything of the sort. But be that as it may, my opinion is that according to the true construction of this will the testator only intended Stanley to bring into account so much, not exceeding £3,000, of the sum which he owed the testator and as remained unpaid at the date of distribution. In the present case that is £80.

It was contended that there was some conflict between In re Aird's Estate, 12 Ch. D. 291, and the decision of the Court of Appeal in In re Taylor's Estate, 22 Ch. D. 495, 500, and that in the later case of In re Wood, 32 Ch. D. 517, North, J., followed the earlier case of In re Aird's Estate. But In re Wood was merely an instance of class 1, the legatee being directed to bring into hotchpot the sum "hereinbefore recited to have been advanced." If, however, the cases cannot stand together, the decision of the Court of Appeal must prevail. The son is, therefore, only bound to bring £80 into account.[49]

[49] In accord as to class 1 are McAlister v. Butterfield, 31 Ind. 25 (1869); In re Alexander's Estate, 206 Pa. 47, 55 Atl. 797 (1903); Younce v. Flory, 77 Ohio St. 71, 83 N. E. 305 (1907); Dodson v. Fulk, 147 N. C. 530, 61 S. E. 383 (1908); In re Lear's Estate (Mo. App.) 124 S. W. 592 (1910). In In re Alex-

In re SHARP.

MADDISON v. GILL.

(Supreme Court of Judicature. Court of Appeal. [1908] 2 Ch. 190.)

Appeal from the decision of Joyce, J. [1908] 1 Ch. 372.

COZENS-HARDY, M. R.[50] In my opinion the decision of Joyce, J., in this case was perfectly right. The testator has made a will which certainly has the merit of brevity. He gave, after certain legacies, his residuary estate upon trust for John Gill, Edgar Gill, the three children of Sarah Mitchell, and here I read in the words of the codicil, "and the six children now living of Samuel Frederick Okey by his first wife in equal shares as tenants in common."

The facts are that there were at one time six children of Samuel Frederick Okey by his first wife, but at the date of the will, and of the death, only one of those six was living, and the question is whether the residue is divisible between John Gill, Edgar Gill, the children of Sarah, and this one child of Samuel Frederick Okey, or, in other words, whether it is divisible in sixths or whether it is divisible in elevenths. In my opinion it is divisible in sixths.

One view which may be taken—and I am not sure that it is not enough to dispose of the whole case—is that, reading the codicil into the will, it is a gift to John Gill and Edgar Gill, the three children of Sarah Mitchell, and such of the six children as are now living of Samuel Frederick Okey by his first wife. Of course, if that be the true construction, all difficulty is got over. I am disposed to think that is the true construction. If, however, that is not the true construction, then it seems to me that by a long series of authorities, which are absolutely binding upon this court, it is a plain case where you have a governing intention to benefit children—not, I agree, forming a class in the sense in which that word is frequently used in legal language, but children described as being the children of a certain person—coupled with a mistake in the number of those children; and under those circumstances the courts have held, and as it seems to me in accordance with common sense, that the dominant intention to benefit the members so described must have effect given to it by rejecting the inaccurate enumeration. Applying that rule, I find that the dominant intention was to benefit the children of Samuel Frederick Okey by his first wife. There was a mistake in the number then living, and you

ander's Estate, supra, the testator charged as an advancement against two sons what was due from one only, but what it seemed he was not irrational in thinking it fair to charge against both, and the court sustained the charge. Compare In re Bresler's Estate, 155 Mich. 567, 119 N. W. 1104 (1909), where an advancement to the husband of testator's daughter was charged against the daughter as money she was "owing."

[50] The statement of facts is omitted, as are the opinions of Buckley, L. J., and Kennedy, L. J.

must treat it simply as a gift to the children or child living at the date of the will, and at the date of the death.

Now the authorities really seem to me to govern this case. I take one of the earliest cases—I think it is the case of Sleech v. Thorington, 2 Ves. Sr. 560. There a capital sum was given to "the two servants that shall live with me at the time of my death" in equal shares. The testatrix had three servants, and it was held that the legacy was divisible in equal thirds. In that case it is quite true that no extra burden was thrown upon the residuary legatee, and it is also quite true that in the absence of extrinsic evidence, which scarcely could have been admissible in a case like that, the whole legacy might have been void for uncertainty but for the application of this rule. But Sir Thomas Clarke there held, following a prior decision of, I think, Lord Hardwicke, that when you found that the dominant idea was "servants living with me at the date of my death," you disregard the number two and you take the number three. A problem was put to Mr. Upjohn in the course of the argument: What would have been the result there if the gift had been "to my coachman my footman and my two domestic servants living with me at the date of my death," and supposing there had been three instead of two? I cannot bring myself to doubt that precisely the same result must have followed, and that the reasoning of Sir Thomas Clarke's decision in no way depends upon the fact that the legacy was given solely to the domestic servants living at the death, but the consequence must be exactly the same if they had been colegatees with other persons named as "my coachman and my groom."

I do not propose to go through the subsequent authorities. It is scarcely necessary to refer to Garvey v. Hibbert, 19 Ves. 125, although that was a very strong case and a very leading case. That was a case where a legacy of £600 was given to each of the three children of Dr. Duval. Dr. Duval had four, and it was held that the fourth was entitled also to a legacy of £600, the result being, of course, that £2,400 was taken out of the residuary estate, instead of only £1,800. I am content to take the principle, for it is a principle, laid down by the courts in the last two centuries, from the judgment of the Court of Appeal in In re Stephenson, [1897] 1 Ch. 75, which, somewhat singularly, Mr. Upjohn seems to regard as an authority in his favor. I do not know where I could find more accurately or more aptly stated the nature and the limitation of the rule. I take first of all the passage from the judgment of Lord Russell of Killowen, [1897] 1 Ch. 81: "The proposition must be limited to this: That, where the court, as a matter of construction, arrives at the conclusion that a particular class of persons"—again not using the word "class" in a technical sense, but a particular description of persons—"is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons composing that class, the court will reject the

enumeration;" and Lindley, L. J., in the same case, [1897] 1 Ch. 83, says: "If the court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the court should not and will not defeat that intention because the testator has made a mistake in the number he has attributed to that class. The court rejects an inaccurate enumeration." That is what the learned judge has done in the present case; that is what, if it be necessary to consider the cases at all on this will, I propose to do here. I think for the reasons I have given the decision of the learned judge was perfectly right, and that the residue is not divisible in elevenths, but is divisible in sixths.

CHAPTER IV

WILLS AND TESTAMENTS DISTINGUISHED FROM CERTAIN OTHER DISPOSITIONS OF PROPERTY

SECTION 1.—FROM DEEDS

SHARP v. HALL.

(Supreme Court of Alabama, 1889. 86 Ala. 110, 5 South. 497, 11 Am. St Rep. 28.)

This was a proceeding to probate the will of Ann E. Hornsby, deceased. The instrument was signed by Mrs. Hornsby, under seal, was attested by J. J. Davis as a subscribing witness, and also by J. T. Kirk on an acknowledgment of her signature made in his presence on the 23d of February, 1886, and was in the following words:

"The State of Alabama, Colbert County. These presents show that, in consideration of the love and affection I have to Julia M. Hall, I do here now give and deliver to her the following property, to wit, a certain lot, or part of lot, situated in the city of Tuscambia, known as part of lot No. 317, according to the plat of said city," describing it by metes and bounds, "together with all the tenements and heredita ments thereunto appertaining, all of which I now hold and possess. But I do hereby reserve the use, control and consumption of the same to myself, for and during my natural life; and this is done, in part, to do away with all need or necessity of taking out letters of administration after my death. Test my hand and seal, this ——— day of February, 1886."

The defendants requested the following charge in writing, and excepted to the court's refusal to give the same: "(6) The fact, if it be a fact, that Mrs. Hornsby did not dispose of all the property, must be considered with the other evidence by the jury to ascertain whether or not the instrument was intended to be a will." The other material facts appear in the opinion. There was a trial by jury, and a verdict for the proponent, followed by a judgment admitting the will to probate, and the contestants appeal.

STONE, C. J.[1] There are few, if any, questions less clearly defined in the law books than an intelligible, uniform test by which to determine when a given paper is a deed, and when it is a will. Deeds, once

[1] The statement of facts is abbreviated, and part only of the opinion is given.

executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death. Out of this has grown one of the tests of testamentary purpose, namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession, enjoyment, or usufruct on the donee or grantee during the life of the maker are always wills, and never deeds, this would seem to be a simple rule, and easy of application. The corollary would also appear to result naturally and necessarily that if the instrument, during the life-time of the maker, secured to the grantee any actual use, possession, enjoyment, or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule. A declaration of trust by which the grantor stipulates to hold in trust for himself during life, with remainder to a donee, or succession of donees, certainly secures no use, enjoyment, or usufruct to the remainder-man during the grantor's life. Yet it is a deed, and not a will. 1 Bigelow, Jarm. Wills, 17, and notes; Gillham v. Mustin, 42 Ala. 365. Can a tangible distinction be drawn between such case and a direct conveyance, in form a deed, by which A. conveys to B., to take effect at the death of A.? The human mind is not content with a distinction that rests on no substantial difference. Conveyances reserving a life-estate to the grantor have been upheld as deeds. 2 Devl. Deeds, § 983; Robinson v. Schly, 6 Ga. 515; Elmore v. Mustin, 28 Ala. 309; Hall v. Burkham, 59 Ala. 349. In Daniel v. Hill, 52 Ala. 430, 436, this court said: "A deed may be so framed that the grantor reserves to himself the use and possession during his life, and on his death creates a remainder in fee in a stranger."

Almost every conceivable form of conveyance, obligation, or writing, by which men attempt to convey, bind, or declare the legal status of property, have, even in courts of the highest character, been adjudged to be wills. The form of the instrument stands for but little.[2] Whenever the paper contemplates posthumous operation, the inquiry is, what was intended? 1 Bigelow, Jarm. Wills, 20, 25; Habergham v. Vincent, 2 Ves. Jr. 204; Jordan v. Jordan, 65 Ala. 301; Daniel v. Hill, 52 Ala. 430; Shepherd v. Nabors, 6 Ala. 631; Kinnebrew v. Kinnebrew, 35 Ala. 638. The intention of the maker is the controlling in-

[2] "It appears from the English authorities prior to the enactment of the English Wills Act of 1837 that there was judicial sanction for the probating of almost every kind of document whereby property could be disposed of or affected, among which we may enumerate deeds, contracts, promissory notes, bills of exchange, letters and diary entries." Gillett, C. J., in Heaston v. Krieg, 167 Ind. 101, 110, 77 N. E. 805, 807, 119 Am. St. Rep. 475 (1906). On the various kinds of instruments held to be wills see 89 Am. St. Rep. 489, note, 10 L. R. A. 95, note.

quiry, and that intention is to be gathered primarily from the language of the instrument itself. Dunn v. Bank, 2 Ala. 152. The intention cannot be proved by a witness speaking directly thereto. But this does not, in cases of inapt phraseology,—such as the present instrument discloses,—preclude proof of instructions given to the draughtsman, in reference to the nature of the paper he was expected to prepare. In Green v. Proude, 1 Mod. 117, 3 Keb. 310, the paper had striking characteristics of a deed; but the court said: "Here being directions given to make a will, and a person sent for to that end and purpose, this is a good will." Speaking of this case, Jarman (1 Bigelow's Ed. p. 19) says: "The court seems to have been influenced by the circumstances that the person who prepared it was instructed to make a will."

In Wareham v. Sellers, 9 Gill. & J. [Md.] 98, the court decided that testimony should have been received of "conversations of the deceased, made at the time of executing the said paper, and from the other circumstances, that the said P. S. made and executed the said paper as and for his last will and testament, and intended it as such." In this case the controversy was whether the paper was a deed or a will. To the same effect is Witherspoon v. Witherspoon, 2 McCord (S. C.) 520.

So all the attending circumstances may be put in proof as aids in determining whether the maker intended the paper should operate as a deed or a will, whenever it is so framed as to postpone actual enjoyment under it until the death of the maker. Gillham v. Mustin, 42 Ala. 365; Daniel v. Hill, 52 Ala. 430; Campbell v. Gilbert, 57 Ala. 569; Jordan v Jordan, 65 Ala. 301; Rice v. Rice, 68 Ala. 216; Lee v. Shivers, 70 Ala. 288; 1 Bigelow, Jarm. Wills, 25; Gage v. Gage, 12 N. H. 371; Mealing v. Pace, 14 Ga. 596, 630; Symmes v. Arnold, 10 Ga. 506; Jackson v. Jackson, 6 Dana (Ky.) 257.

Another pertinent inquiry: If a paper cannot have operation as a deed, but may as a will, then in doubtful cases we should pronounce it a will, utres magis valeat. Bigelow, Jarm. Wills, 21, 22, 24, 25; Attorney General v. Jones, 3 Price, 379; Gage v. Gage, 12 N. H. 371; Symmes v. Arnold, 10 Ga. 506.

The instrument sought to be established as a will is in form a nondescript. It clearly shows on its face that the donee or grantee was to have no actual enjoyment of the property—no usufruct—during the life of the maker. Its language is: "I do hereby reserve the use, control, and consumption of the same to myself for and during my natural life." We hold that the paper, on its face, falls within the indeterminate class, which, according to circumstances, may be pronounced a deed or a will. We also hold that, on the trial of the issue, it was competent to prove that the maker was without lineal or other very near relatives; that she was attached to the donee, who was a member of her household; that she sent for the draughtsman of the paper, and employed him to write her will, and that, in pursuance of such employment, he wrote the paper in controversy, and that she signed it with

a knowledge of its contents, and had it attested; that she did not deliver it, but had it placed in an envelope, and indorsed, "Not to be opened till after my death;" and that she carefully preserved it in such envelope until her death. Now, all these facts and circumstances, if proven and believed, were competent and proper for the consideration of the jury in determining the issue of devisavit vel non. And the fact, if believed, that the paper had never been delivered, and therefore could not take effect as a deed, should also be considered in arriving at the maker's intention. * * *

The paper over which the present contention arose contains the following clause: "And this [the execution of the paper] is done in part to do away with all need or necessity of taking out letters of administration after my death." This clause is a circumstance which the jury may look at and consider in determining whether Mrs. Hornsby intended that Julia M. Hall should take or enjoy any interest during the former's life. It is not conclusive, but must be weighed with the other evidence. It would probably be more weighty if it made provision for Mrs. Hornsby's entire estate. Attempts—fruitless, of course—are sometimes made to dispense with administration. even in documents that are unmistakably testamentary.

Charge No. 6, asked by contestants, should have been given. The remaining charges asked by them were, in the light of the evidence, calculated to confuse or mislead, and were rightly refused on that account.

We have now considered all the questions we deem necessary. In a very few of the many rulings the probate court erred. Reversed and remanded.[3]

[3] On deeds as wills, see 89 Am. St. Rep. 494, note; 1 L. R. A. (N. S.) 315, note; 4 Prob. Rep. Ann. 217, note; 10 Prob. Rep. Ann. 97, note; 7 Am. & Eng. Ann. Cas. 790, note.

In Wilenou v. Handlon, 207 Ill. 104, 69 N. E. 892 (1904), a deed which had been recorded by the grantor, though intended by him as a will, was canceled and set aside at the suit of the grantor.

"An important question in this case is whether the deeds can be held to be a testamentary disposition of the property described in them. We may premise a discussion of that question by the statement that the circumstances under which they were made, and attending their disposition and custody, are convincing that they were so intended. Indeed, they leave no doubt that such was the testator's intention. But the rule is that a testator's intention cannot be given effect as against the plain and unambiguous provision of a deed, and the rule is settled in this state that where there is nothing in the instrument to indicate a testamentary intent, but, on the contrary, it is in terms plainly a deed conveying a present interest, extrinsic evidence is not admissible to show the contrary. The subject is discussed at length in the case of Clay v. Layton, 134 Mich. 341, 96 N. W. 458." Hooker, J., in Dodson v. Dodson, 142 Mich. 586, 105 N. W. 1110 (1905). See, also, Noble v. Fickes, 230 Ill. 594, 82 N. E. 950 (1907). See 12 Am. & Eng. Ann Cas. 287, note; 13 L. R. A. (N. S.) 1203, note.

SECTION 2.—FROM GIFTS CAUSA MORTIS

MARSHALL v. BERRY.

(Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 43.)

Tort in favor of the administrator of the estate of Abby L. Marshall for the conversion of three United States bonds and two United States treasury notes, of $100 each.

At the trial in the superior court, before Morton, J., there was evidence tending to show that the intestate, who was the plaintiff's wife, died on the 17th of June, 1865, leaving no child; that she was the owner of the property mentioned in the declaration, and while on her death-bed, and then being under the immediate apprehension of death, she directed the defendant upon her decease to deliver the bonds to her brother Edward Berry as a donatio causa mortis; that at the same time she delivered to the defendant for her mother the treasury notes, and directed him upon her decease to deliver them to her mother as a donatio causa mortis. Neither the mother nor the brother was present and there was no delivery to either in the lifetime of Mrs. Marshall. She died soon afterwards, leaving no debts, and no other property except to the value of five hundred and fifty dollars; and the defendant claimed said sum, as having been transferred and given to him by the intestate before her death, and had commenced a suit which is now pending to recover the same. Soon after Mrs. Marshall's death, and before the property had been delivered as directed by her, and before the plaintiff had taken out letters of administration, he notified the defendant not to deliver the bonds and treasury notes to the brother and mother respectively. The plaintiff was appointed as administrator on the 5th of July, 1865, and in the latter part of the same month demanded the bonds and notes from the defendant, but not until after the same had been delivered to the brother and mother in pursuance of the directions of the deceased; and said delivery was without the knowledge of the plaintiff.

The defendant asked the court to instruct the jury that upon this evidence the plaintiff could not maintain this suit; but the judge declined so to rule, and instructed the jury that the plaintiff was entitled to a verdict for the value of the bonds and notes. The jury returned a verdict accordingly, and the defendant alleged exceptions.

WELLS, J.[4] The evidence tended to show a good donatio causa mortis of a part at least of the property claimed by the administrator. It was property which is now held to be capable of such disposition. Delivery to a third person for the intended donee, to be given to him

[4] Part only of the opinion is given.

after the decease of the donor, and actual receipt and acceptance by the donee after such decease, complete the conditions of such a gift and perfect the title in the beneficiary. Sessions v. Moseley, 4 Cush. 87; 1 Williams on Executors (4th Am. Ed.) 686, note. It would seem, therefore, that the ruling of the judge who tried the case, directing a verdict for the plaintiff, must have been upon the ground which has been argued by the plaintiff's counsel here, namely, that a married woman is not authorized under our statutes to make such a disposition of her separate property. * * *

It is contended that a gift mortis causa is a testamentary disposition of estate, and therefore, if made by a married woman, would be contrary to the intent of Gen. St. c. 108, § 9, and, if sustained, would tend to defeat that provision. Although it is of a testamentary character in some of its incidents, and is said to have been deemed by the Roman law "of the nature of legacies;" 1 Story on Eq. § 607; yet inasmuch as, by our law, an actual delivery, or some equivalent act, by the donor, in his lifetime, is necessary to its validity, we think it must be regarded as, in its essential character, a gift. The title passes by the delivery, defeasible, only in the lifetime of the donor, by revocation, either express, or implied by his recovery or some other act inconsistent with the gift and indicating a purpose to resume it. The death of the donor perfects the title, by terminating his right or power of defeasance. This mode of transmission can apply only to certain specific articles capable of passing by delivery, and not as a [complete?] disposition of the donor's estate. If it purport to be such a disposition, that is, if it assume the province of a will, it is void. Headley v. Kirby, 18 Pa. 326.[5] It is not subject to probate, nor to contribution with legacies in case of insufficiency of assets, nor to any of the incidents of administration. The donor at his decease is held to be already devested of his property in the subject of the gift, so that no right or title in it passes to his personal representatives. The donee takes the gift, as it is said, not from the administrator, but against him. It is subject to debts; but only in the same way as other voluntary conveyances and gifts would be. That the wife may thereby evade the provision of the statute, which disables her from depriving her husband of more than half of her personal estate by her will, without his consent in writing, may be equally urged against any disposition of it in her lifetime. This consideration does not protect the wife from such disposition of his estate by the husband. Chase v. Redding, 13 Gray, 418.

We see no reason for guarding the rights of the husband more tenderly than those of the wife. In the case of Jones v. Brown, 34 N. H. 439, the court seem to hold a contrary doctrine, both as to the nature of the gift, and the power of the wife to make it. But if the

[5] But see Michener v. Dale, 23 Pa. 59 (1854); Meach v. Meach, 24 Vt. 591 (1852); Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170 (1892).

current of authorities be interpreted by the thing decided rather than by the phraseology used, it must result in the position before stated, that a donatio causa mortis is not a testament but a gift. Nicholas v. Adams, 2 Whart. (Pa.) 17–22, and Dole v. Lincoln, 31 Me. 422, contain strong statements of this view of the subject. * * *

The verdict must therefore be set aside and a new trial granted. Exceptions sustained.[6]

[6] "A gift causa mortis resembles a testamentary disposition of property in this: That it is made in contemplation of death, and is revocable during the life of the donor. It is not, however, a testament, but in its essential characteristics is, what its name indicates, a gift. Actual delivery by the donor in his lifetime is necessary to its validity, or if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. The donee's possession must continue during the life of the donor, for recovery of possession by the latter is a revocation of the gift. But in case of a legacy, the possession remains with the testator until his decease. The title to a gift causa mortis passes by the delivery, defeasible only in the lifetime of the donor, and his death perfects the title in the donee by terminating the donor's right or power of defeasance. The property passes from the donor to the donee directly, and not through the executor or administrator, and after his death it is liable to be divested only in favor of the donor's creditors. In this respect it stands the same as a gift inter vivos. It is defeasible in favor of creditors, not because it is testamentary, but because, as against creditors, one cannot give away his property. A gift causa mortis is not subject to probate, nor to contribution with legacies in case the assets are insufficient, nor to any of the incidents of administration. It is not revocable by will [but see Jayne v. Murphy, 31 Ill. App. 28 (1889)], for, as a will does not operate until the decease of the testator, and the donor, at his decease, is divested of his property in the subject of the gift, no right or title in it passes to his representatives. The donee takes the gift, not from the administrator, but against him, and no act or assent on the part of the administrator is necessary to perfect the title of the donee. Cutting v. Gilman, 41 N. H. 147, 151; Marshall v. Berry, supra [13 Allen, 43, 46]; Doty v. Willson, 47 N. Y. 580, 585; Dole v. Lincoln, 31 Me. 422; Chase v. Redding, 13 Gray, 418; Basket v. Hassell, 107 U. S. 602 [2 Sup. Ct. 415, 27 L. Ed. 500]; 1 Wms. Ex'rs, 686, note 1. A valid gift inter vivos may be made on similar terms. Worth v. Case, 42 N. Y. 362; Dean v. Carruth, 108 Mass. 242; Warren v. Durfee, 126 Mass. 338. A gift causa mortis in some respects may be said to resemble a contract, the mutual consent and concurrent will of both parties being necessary to the validity of the transfer. 2 Kent. Com. 437, 438; 1 Pars. Cont. 234. Contracts are commonly understood to mean engagements resulting from negotiation. 2 Kent, Com. 437. And in Peirce v. Burroughs, 58 N. H. 302, it was held that the assent of both parties is as necessary to a gift as to a contract." Smith, J., in Emery v. Clough, 63 N. H. 552, 554, 555, 4 Atl. 796, 798. 56 Am. Rep. 543 (1885).

"It has already been stated that an essential feature of the gift mortis causa is its ambulatory nature before consummation by the donor's death. Not only may the donor, while living, revoke the gift at his pleasure, and give it to another, but revocation follows impliedly in several instances without the donor's affirmative action. Thus, the recovery of the donor from the illness or delivery from the peril which induced the gift works its revocation, although the recovery be temporary and death may finally ensue from the same cause. The death of the donee occurring before that of the donor likewise operates a revocation, similar in effect to the lapsing of a bequest by the death of the legatee before that of the testator. And it has been held that the donatio mortis causa partakes of the nature of legacies to the extent of being revocable by the subsequent birth of issue to the donor. A donatio mortis causa cannot be revoked by the last will or testament, although there be a different testamentary disposition of the specific thing given mortis causa, because the will speaks as of the moment of the testa-

SECTION 3.—FROM CONTRACTS TO BEQUEATH OR TO DEVISE

ALLEN et al. v. BROMBERG et al.

(Supreme Court of Alabama, 1906. 147 Ala. 317, 41 South. 771.)

DENSON, J.[1] The bill in this case was filed to enjoin the probate of a will in the probate court of Mobile county, upon the allegation that its execution was in violation of a contract, made between the testatrix and her husband, to execute similar wills, with the same executors, each in favor of the other for life, with remainder to certain public charities. The bill avers that the contract was performed upon the part of the husband who died first, and that the testatrix, his wife, accepted the benefits therefrom. It further avers that the testatrix in 1902 made a will in conformity with her contract with her husband,

tor's death, which has vested the previous gift irrevocably in the donee. [See Emery v. Clough, supra; Brunson v. Henry, 140 Ind. 455, 39 N. E. 256 (1894). But see Jayne v. Murphy, 31 Ill. App. 28 (1889)]. But the gift of a legacy to one who has received a gift mortis causa may raise the presumption that the former is a substitution for the latter; and the donee may sometimes be compelled to choose between them, not being entitled to both. The gift causa mortis is defeasible by reclamation, or any act of the donor inconsistent with the gift and indicating his purpose to resume possession thereof. Hence the gift is revoked by the demand of the donor for a redelivery, although the donee refuse to surrender it. Like gifts inter vivos and legacies, gifts mortis causa are subject to defeasance in favor of the donor's creditors, because, as against them, one cannot give away his property." 1 Woerner's American Law of Administration (2d Ed.) *125–*126.

"The condition which inheres in the gift causa mortis is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the meantime the gift is executed, the title has vested, the dominion and control of the donor has passed to the donee." Matthews, J., in Basket v. Hassell, 107 U. S. 602, 616, 2 Sup. Ct. 415, 424, 27 L. Ed. 500 (1882). See Knight v. Tripp (Cal.) 49 Pac. 838 (1897). But in Hatcher v. Buford, 60 Ark. 169, 176, 177, 29 S. W. 641, 643, 27 L. R. A. 507 (1895), the court says: "We think the better doctrine upon the transfer of the title to gifts causa mortis is that which accords with Justinian's definition, and recognizes the subject-matter of the gift as becoming the property of the donee in the event of the donor's death; i. e., the donor's death is a condition precedent to the vesting of the title to the thing given in the donee."

On the sufficiency of the delivery needed to effect a gift causa mortis, see 10 Prob. Rep. Ann. 385, note; 18 L. R. A. 170, note. See, particularly, Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170 (1892); Cain v. Moon, [1896] 2 Q. B. 283; Drew v. Hagerty, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255 (1889); Davis v. Kuck, 93 Minn. 262, 101 N. W. 165 (1904). See, also, Nelson v. Peterson, 202 Mass. 369, 88 N. E. 916 (1909). There can be no gift causa mortis of real property. See 13 Prob. Rep. Ann. 560, note. But it has been held that a vendor who has contracted to sell realty may make a good gift causa mortis of his interest to his wife by delivering to her the contract of sale and their joint deed to be placed in escrow Davie v. Davie, 47 Wash. 231, 91 Pac. 950 (1907).

[1] The statement of facts is omitted.

but in 1905 had executed the will containing different dispositions, the probate of which is opposed. The persons named as executors in the will of 1905, and the beneficiaries therein, are made parties defendant. The injunction prayed for in the bill was granted. This appeal is from the refusal to dissolve the injunction and to dismiss the bill for want of equity.

It cannot be doubted that a person may make a valid agreement to dispose of his property by will in a particular way, and that a court of equity will require its performance. Bolman v. Overall, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107.[8] In the case cited it is said: "It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy; for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed as long as he lives, and after death he is no longer capable of doing the thing

[8] See Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619 (1908); Kine v. Farrell, 71 App. Div. 219, 75 N. Y. Supp. 542 (1902). So one may contract to die intestate. Taylor v. Mitchell, 87 Pa. 518, 30 Am. Rep. 383 (1878); Jones v. Abbott, 228 Ill. 34, 81 N. E. 791, 119 Am. St. Rep. 412 (1907). But the evidence of the agreement must be clear. Klussman v. Wessling, 238 Ill. 568, 87 N. E. 544 (1909).

"A party may obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate. But the courts will be strict in looking into the circumstances of such agreements, and require full and satisfactory proof of the fairness and justness of the transaction. Newton v. Newton, 46 Minn. 33 [48 N. W. 450]; Svanburg v. Fosseen, 75 Minn. 350 [78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490]. The remedy for the breach of such a contract depends upon the facts of each particular case. If the contract be an oral one to devise land, and is reasonably certain as to its subject-matter and its stipulations, equity will decree specific performance, if there has been part performance of such a character as will take a parol agreement to convey land out of the statute of frauds, upon principles which courts of equity recognize and act upon. If the consideration for the contract be labor and services, which may be estimated and their value liquidated in money, so as to reasonably make the promisee whole, specific performance will not be decreed. But where the consideration of the contract is that the promisee shall assume a peculiar and domestic relation to the promisor, and render to him services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed. Svanburg v. Fosseen, supra; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773, notes." Start, C. J., in Stellmacher v. Bruder, 89 Minn. 507, 509, 95 N. W. 324, 325, 99 Am. St. Rep. 609 (1903).

The statute of limitations begins to run against a suit on the contract at the death of the party breaking the contract. Banks v. Howard, 117 Ga. 94, 97, 43 S. E. 438, 439 (1902). In that case it was stated that: "On the other hand, if the party who is to be benefited by the will sees proper to waive his rights under the will and sue the estate upon a quantum meruit for the value of the services rendered the deceased in his lifetime, it would seem that the statute of limitations would begin to run from the time the service was rendered and not from the date of the death of the intestate."

But, contra to this statement, see Appeal of Hull (Conn.) 74 Atl. 925 (1910).

On contracts to devise or bequeath, see 66 Am. Dec. 783, note; 4 Prob. Rep. Ann. 542, note; 14 L. R. A. 860, note. On the validity of oral agreements to devise land, see 5 Am. & Eng. Ann. Cas. 495, note; 15 L. R. A. (N. S.) 466, note. And see Grindling v. Rehyl, 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466 (1907).

agreed by him. But the theory on which the courts proceed is to construe such agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisees, and to enforce such trust against the heirs and personal representatives of the deceased or others holding under them charged with notice of the trust. The courts do not set aside the will in such cases, but the executor, heir, or devisee is made a trustee to perform the contract."

As a contract for the execution of a will with particular provisions can be specifically enforced only by fastening a trust on the property of the testator in favor of the promisee and enforcing such trust against the personal representatives and others claiming under the will violating the terms of the contract, it is necessary that the will be first probated, "for it cannot be recognized in any forum until admitted to probate." Describes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 501. Nor does the fact that the agreement embraced the appointment of the same executors in both wills give equity to the bill. As stated, no breach of the agreement in any of its parts can be assumed as long as the testator lives, and after his death he is no longer capable of doing the thing agreed upon. Such agreement could be specifically enforced only by setting aside the latter will and probating the former. This could not be done. A will is in its very nature ambulatory, subject to revocation during the life of him who signed it, and is revoked by the execution of another will. Code 1896, § 4264. After such revocation it can be revived only by the expressed intention of the testator himself. Code 1896, § 4266.

For the reasons above given, a decree will be here rendered dissolving the injunction and dismissing the bill for want of equity.

CHAPTER V

KINDS OF WILLS AND TESTAMENTS

SECTION 1.—A WILL IN WRITING

MYERS v. VANDERBELT.

(Supreme Court of Pennsylvania, 1877. 84 Pa. 510, 24 Am. Rep. 227.)

MERCUR, J.[1] This case presents the single question whether an instrument wholly written and signed with lead pencil may be a valid will.

The sixth section of the act of assembly of 8th April, 1833, declares: "Every will shall be in writing." It does not indicate the material on which it shall be written, nor the instrument or materials with which the writing shall be impressed. In Blackstone's Com. book 2, p. 297, it is said: "A deed must be written or I presume printed, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed." This writer does not prescribe whether the writing shall be in ink or in pencil. He stops with declaring the substances on which it shall be made.

Writing is the expression of ideas by visible letters. It may be on paper, wood, stone, or other material. The ten commandments were written with the finger of God on tables of stone. Exodus, xxxi, 18. The general rule undoubtedly is that, whenever a statute or usage requires a writing, it must be made on paper or parchment; but it is not essentially necessary that it be in ink. It may be in pencil. This view is sustained by numerous authorities, as applied to contracts generally. Chitty on Cont. 91; Jeffery v. Walton, 2 E. C. L. R. 385; Gray v. Physic, 11 E. C. L. R. 443; Merritt v. Clason, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; Clason v. Bailey, 14 Johns. (N. Y.) 490.

The same rule applies to promissory notes. Byles on Bills, 134; Story on Prom. Notes, § 11; Gray v. Physic, supra; Closson v. Stearns, 4 Vt. 11, 23 Am. Dec. 245; Partridge v. Davis, 20 Vt. 499; Brown v. Butchers' & Drovers' Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

So a book account made in pencil was held admissible in evidence as a book of original entries. Hill v. Scott, 12 Pa. 169. In 1 Redfield on Wills, § 17, pl. 2, it is said "the English Statute of Frauds

[1] The statement of facts is omitted.

expressly required that a will of lands should be in writing. But it has been held that a will written in pencil, instead of ink, would be good," citing In re Dyer, 1 Hag. Ec. 219.. That a will written in pencil may be valid was also ruled in Raymes v. Clarkson, 1 Phil. Ecc. 22; Dickenson v. Dickenson, 2 Phil. Ecc. 173.

In Main et al. v. Ryder, 84 Pa. 217, speaking of the signature of a testator, it was said the manifest object of the act is to permit a will to be signed as any other written instrument may be signed. So we think the authorities establish that a valid will may be drawn with the same materials that will suffice for the drawing of any written contract. As was well said by Mr. Justice Coulter in Hill v. Scott, supra, they abundantly prove that a writing in pencil is equivalent and tantamount to a writing in ink.

The validity of a will written or signed with a lead pencil was referred to, but left undecided, in Patterson v. English, 71 Pa. 459; but the opinion by Mr. Justice Williams contains a strong declaration against the propriety of writing or signing in that manner. The reason given against it is the facility with which the writing may be altered or effaced. There is force in this suggestion. No prudent scrivener will write a will in pencil, unless under extreme circumstances. Whenever written, any appearance of alteration should be carefully scrutinized. Yet inasmuch as the statute is silent on the question, we cannot say the mere fact that it is written or signed in pencil, thereby makes it invalid. It is nevertheless a writing, known and acknowledged as such by the authorities, and fulfils the requirement of the statute. Judgment affirmed.[2]

SECTION 2.—HOLOGRAPHIC (OR OLOGRAPHIC) WILLS

MILAM v. STANLEY.

(Court of Appeals of Kentucky, 1908. 111 S. W. 296, 33 Ky. Law Rep. 783, 17 L. R. A. [N. S.] 1126.)

HOBSON, J. W. R. Fletcher was convicted in the Logan circuit court of rape, and sentenced to be hung. He appealed to this court, where the judgment was affirmed. He applied to the Governor for clemency, and his application was denied. The date of his execution

[2] See Tomlinson's Estate, 133 Pa. 245, 19 Atl. 482, 19 Am. St. Rep. 637 (1890). That a will may not be written with slate pencil on a slate was held in Reed v. Woodward, 11 Phila. 541 (1875). That a will partly in handwriting and partly in printed form may be a will in writing, see Sears v. Sears, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353 (1907). Compare Ilenshaw v. Foster, 9 Pick. (Mass.) 312 (1830).

"The proposition that writing in pencil is presumptive of deliberation, and no intent of finality, is so foreclosed by authority that but brief reference to

was fixed for February 15, 1907. On February 12, 1907, he wrote the following letter:

"My Dear Loving Daughters: I guess my last hope is gone. I don't want you all to grieve after me for I think I will be better off than to be in jail, for I think I am prepared to go and I want to ask one thing of you all is to meet me in heaven Jennie, Lula and Bettie and Mary, I want you to understand that I am as innocent of the charge which I have to die for as an angel in heaven and it does me good to know that God knows that I am not guilty. Jennie tell John to see that my body is taken home and buried in our own graveyard and get Stinson to preach my funeral. Tell him I am at rest. I want to make you and Lula a deed to that house and lot and I don't want you and her to ever have any trouble over it. Jennie I don't do this because I think more of you and Lula than I do of Mary and Bettie but I do it because you both attended to your dear old mother so good. I hope to soon meet her in heaven. Jennie Mary has got enough of my money to bury me I guess. So this is from your loving father. W. R. Fletcher.

"To Jennie and Lula may God bless you all is my prayer. Yours, W. R. F."

He was executed on February 15th, and afterwards the letter was offered for probate as his will. The appeal before us is prosecuted from the judgment of the circuit court admitting the paper to probate. It is insisted that the paper is not testamentary in character, that it only indicates an intention to make Jennie and Lula a deed to the house and lot, and that the deceased, having died without executing this intention by making a deed, the paper cannot be probated as a will.

In determining whether the paper is testamentary or not the court will look, not only at the language of the instrument, but at the situation of the maker and at his intention. W. R. Fletcher knew when he wrote this paper that he was to die on February 15th. His last hope of life was gone; and, knowing that he was to die on the 15th, he wrote this letter to his daughters. The letter shows on its face that it is inartificially written, but his meaning is sufficiently apparent. He did not have in mind that he was thereafter to make his daughters a deed to the house and lot. What he had in mind was that he wished them to have the house and lot, and not to have any trouble over it; for he added, "I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to

it is merited here. 'Statutes requiring wills to be made in writing are fully satisfied by printing from plates or type, by typewriting, or by writing made with a lead pencil.' Rood on Wills, § 246. And in Estate of Tomlinson, 133 Pa. 245, 19 Atl. 482, 19 Am. St. Rep. 637, it is held: 'A will wholly written in lead pencil is as valid as if written in ink; and the cancellation of legacies in lead pencil, though in a will written in ink, may be as final and conclusive as to the intent of testator as if made in ink.' Such is the American authority. Underhill on Wills, § 183." Robinson, J., in La Rue v. Lee, 63 W. Va. 388, 392, 60 S. E. 388, 390, 14 L. R. A. (N. S.) 968 (1908).

your dear old mother so good." These words show that he had in mind, not something that he was going to do, but something he was then doing. In other words, they show that he intended them to have the house and lot by virtue of the letter he was then writing, and not by virtue of some instrument he was thereafter to write.

A will may be in any form. The words in which the intention of the testator is expressed are immaterial, if it sufficiently appears from the instrument that he was making a disposition of his property testamentary in character. In Clarke v. Ransom, 50 Cal. 595, the following note, written in expectation of death, was probated as a will: "Dear old Nance, I wish to give you my watch, two shawls, and also $5,000, your old friend, E. A. Gordon." In Byers v. Hoppe, 61 Md. 206, 48 Am. Rep. 89, the decedent wrote on the back of a business letter, addressed to a man and his wife, the following, addressed to the wife: "After my death you are to have $40,000. This you are to have will or no will. Take care of this until my death." In Hunt v. Hunt, 4 N. H. 434, 17 Am. Dec. 438, the decedent indorsed on the back of a note these words: "If I am not living at the time this note is paid, I order the contents to be paid to A. H." He died before the note was paid. In Fickle v. Snepp, 97 Ind. 289, 49 Am. Rep. 449, the instrument was in form a promissory note. In all these cases the papers were probated as a will. Indeed, the general rule is that an instrument is a will, if properly executed, whatever its form may be, if the intention of the maker to dispose of his estate after his death is sufficiently manifested. Babb v. Harrison, 9 Rich. Eq. (S. C.) 111, 70 Am. Dec. 203.

Under these principles the circuit court properly admitted the paper to probate as the will of W. R. Fletcher. Judgment affirmed.[4]

[4] See Arendt v. Arendt, 80 Ark. 204, 96 S. W. 982 (1906). On letters as wills, see 15 L. R. A. 635, note; 17 L. R. A. (N. S.) 1126, note.

In a West Virginia case, where under the state statute the only requisites of a holographic will were that it should be wholly written by the testator and signed by him in such manner as to make it manifest that the name was intended as a signature, and where consequently it need not be dated, let alone witnessed, the court said of such a will written with a purple indelible pencil and containing erasures and interlineations made by a black graphite pencil in the testator's handwriting: "So we say that erasures in a holographic will, made by the hand of testator himself, is legal revocation of such portions as are so erased, since it is in the manner required for a will of that kind to be executed; and new portions written into such will by the same hand, to take the place of erasures, or new portions otherwise written therein by the same hand, being thereby executed in the manner which justifies the validity of a holographic will originally, so long as the signature of the testator remains in such manner as to make it manifest that it is intended as a signature, do not in any sense invalidate the will or affect its finality, since it is then a complete new holographic will, and needs no re-execution or republication before witnesses, because it did not originally demand execution and publication before them. To say that the whole must be rewritten and again signed by testator is simply to say that which is neither reasonable nor practicable. There was alteration in the mode provided by law, since it is proved that such alteration was made in the handwriting of testator. Sharp v Sharp, 2 Leigh (Va.) 256 (1830). We think that

SECTION 3.—NUNCUPATIVE WILLS[5]

GODFREY v. SMITH et al.

(Supreme Court of Nebraska, 1905. 73 Neb. 756, 103 N. W. 450.)

OLDHAM, C.[6] Charles A. Smith, who, for about 18 years prior to his death, resided in, and at the time of his death was a resident of, Kearney county, Neb., departed this life March 4, 1903, in the city of Minden, leaving as his sole and only heirs his widow, Lillie A. Smith, and his daughter, Alta Smith, a minor of the age of seven years, and

these considerations sufficiently dispose of the proposition that the erasures and interlineations on their face affect this writing as a will, or its finality as such." Robinson, J., in La Rue v. Lee, 63 W. Va. 388, 391, 60 S. E. 388, 390 (1908). See 14 L. R. A. (N. S.) 968, note.

As to what is a sufficient signing of a holographic will, see Roy v. Roy's Executors, 16 Grat. (Va.) 418, 84 Am. Dec. 696 (1863); Dinning v. Dinning, 102 Va. 467, 46 S. E. 473 (1904).

Under statutes requiring such a will to be dated by the hand of the testator, an abbreviated date will do, as, for instance, Nov. 20, /97. Matter of Lakemeyer, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96 (1901). Compare Estate of Sullivan, 130 Pa. 342, 18 Atl. 1120 (1889). But where a testator used a letter head having the figures "189" printed on it, he was held not to date it by his hand by filling in before and after these printed figures, so that the whole read "December 12, 1892." Succession of Robertson, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672 (1897). See, also, In re Plumel's Estate, reported post, p. 215; In re Noyes' Estate (Mont.) 105 Pac. 1017 (1909). So the writing of "April 1st" before a printed "1880" has been held not to be a dating by the hand of the testator. Estate of Billings, 64 Cal. 427, 1 Pac. 701 (1884). It has been held, however, that an erroneous date will not invalidate such a will. Estate of Fay, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17 (1904); Barney v. Hayes, 11 Mont. 99, 27 Pac. 384 (1891). Nor will the fact that the writing of the will is started and the will is dated on one day, but it is not finished until a subsequent day. Clisby v. Clisby, 145 Cal. 407, 78 Pac. 964, 104 Am. St. Rep. 58 (1904).

Where unwitnessed holographic wills are recognized, a holographic codicil to an attested will is valid. In re Soher, 78 Cal. 477, 21 Pac. 8 (1889). Compare In re Plumel's Estate, post, p. 215.

For discussions of holographic wills, see 104 Am. St. Rep. 22, note; 11 Prob. Rep. Ann. 458, note; 1 Coffey's Prob. Dec. 432, note. As to the requirement in some states that the will must be found among the valuable papers of the testator to be valid, see 5 Am. & Eng. Ann. Cas. 636, note; 104 Am. St. Rep. 33, note. On wills in Louisiana, see Remsen on the Preparation and Contest of Wills, p. 21. On wills in Porto Rico, see Id. p. 23.

[5] See Sections XIX–XXIII of the Statute of Frauds (29 Car. II [1676]), and section XI of the Wills Act (7 Wm. IV and 1 Vict. c. 26 [1837]), printed in the Appendix, post, pp. 758, 759, 763.

"Nuncupative wills were not forbidden by the Statute of Frauds, but were placed under such restrictions as practically abolished them. * * * Such wills have been subjected to peculiar regulations by various statutes. 26 Geo. III, c. 63, 32 Geo. III, c. 34, § 1, 11 Geo. IV, c. 20, §§ 48, 49, 50, and 2 & 3 Wm. IV, c. 40, §§ 14, 15, which are not affected by 1 Vict. c. 26. See sections 11 and 12." 1 Jarman on Wills (6th Ed.) *78, and note.

[6] Part only of the opinion is given.

leaving an estate consisting of real estate of the value of $12,000 and personal property of the value of $1,000. Within six days after the death of Charles A. Smith, his widow, Lillie A. Smith, had reduced to writing a paper purporting to be the nuncupative will of Charles A. Smith. * * *

Section 4993, Cobbey's Ann. St. 1903, provides as follows:

"No nuncupative will shall be good, when the estate thereby bequeathed shall exceed the value of one hundred and fifty dollars, that is not proved by the oath of three witnesses, at least, that were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; nor unless such noncupative will was made at the time of the last sickness of the deceased, and in the place of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more next before the making of such will, except when such person was unexpectedly taken sick, being from home, and died before he or she had returned to the place of his or her habitation."

It will be noted that this provision of the statute requires that the will be proved by the oath of at least three witnesses who were present at the making thereof, and that it be proved that the testator at the time did bid the persons present, or some of them, to bear witness that such was his will, or to that effect. Under this provision of the statute it must be proved that the deceased, while uttering the words offered as a will, had not only a present testamentary intention, but also an intention to make an oral will, and that he intended that the words then uttered, and no others, should constitute his will. If he only gives instructions for a will that he desires to have reduced to writing, but fails to execute, the instructions cannot be sustained as a nuncupative will. 1 Underhill on Wills, § 174; In re Hedben's Estate, 20 N. J. Eq. 473; In re Male's Estate, 49 N. J. Eq. 266, 24 Atl. 370; Porter's Appeal, 10 Pa. 254; Reese v. Hawthorn, 10 Grat. (Va.) 548; Ellington v. Dillard, 42 Ga. 361.

Now, which one of the witnesses to this will, from the evidence above set out, was called upon to bear witness in the presence of the others that the words then spoken were intended to be the last will and testament of Charles A. Smith? It certainly was not the minor defendant, Alta Smith, for practically all she remembered of the conversation was that her father intended to give her $1,000, and let her mother have the balance. She did not remember, nor assume to remember, that he called on either Mr. Taylor or her mother to witness that any particular words were his last will, or anything to that effect. If the will offered for probate is sustained, and if it were held that real estate may be devised by nuncupative will under our statute, the effect of this disposition of the estate of the decedent would be to practically disinherit this minor defendant, so that probably she could not be properly held an incompetent witness because of interest in the

proposed will. But in view of the very tender age of this witness she would be presumptively incompetent to testify as either a subscribing witness or an attesting witness to a will in the absence of proof showing sufficient understanding to comprehend something of the nature and contents of the instrument which she was called upon to attest, and no proof of this kind is in the record. Proof of the rogatio testium or formal calling of witnesses to bear witness is a necessary element in this class of wills, and, no matter how clear the testatory intent may be proven, a paper offered as such will be invalid as a nuncupative will without satisfactory proof of this requisite. Page on Wills, § 237; Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423; Grossman's Estate, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219; Wiley's Estate, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep 569; Page's Will, 23 Wis. 69; Porter's Appeal, 10 Pa. 254.

While it is true that in the proof of the rogatio testium no particular form of words is required, and it is sufficient under the provisions of our statute if the testator, by words, sign, or token, indicate to one of the witnesses to bear testimony that the words then spoken are intended as the last will of the testator, yet such word, sign, or token must have been intended by the testator as a request, and must have been understood as such by the witnesses present. Weir v. Chidester, 63 Ill. 453; Owens' Appeal, 37 Wis. 68; Bradford v. Clower, 60 Ill. App. 55. Now, if we construe the words as spoken to witness Taylor by decedent, "I want you to see that it goes that way," as a sufficient request to bear witness to his will, proof of this request is only supported by the testimony of witness Taylor, who is disinterested, and the wife of decedent, who is the beneficiary under the will. While it is only necessary to call on one witness to bear witness, yet it must be done in the presence of the other witnesses, and such fact must be proved by their testimony.

The general rule is that a nuncupative will cannot be established by one having an interest as legatee in the will. Beach on Wills (Pony Series) § 10; Gills' Will, 2 Dana (Ky.) 447; Haus v. Palmer, 21 Pa. 296; Jones v. Norton, 10 Tex. 120. Nuncupative wills, except those of soldiers and sailors in the active military or naval service of the government, have never been looked upon with favor by the courts, and proof of such wills is required in strict conformity with the statute authorizing them. Morgan v. Stevens, 78 Ill. 287; Yarnall's Will, 4 Rawle (Pa.) 46, 26 Am. Dec. 115; Biddle v. Biddle, 36 Md. 630; Taylor's Appeal, 47 Pa. 31; Leachman v. Bonall, 1 Addams, Ecclesiastical Rep. 387.

Section 4995, Cobbey's Ann. St. 1903, provides as follows:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto, shall be wholly void unless there be two other subscribing witnesses to the same; but a new charge on the land of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will."

This section of the statute plainly declares the policy of preventing the proof of wills from being established by interested witnesses. While it is true that the words "subscribing witnesses," used in this section, technically construed, would only apply to a witness to a written will, and not to the attesting witness of an oral testament, yet, if this narrow construction be given the section above quoted, it destroys the effect of the use of the words "all beneficial devises, legacies and gifts whatsoever made or given in any will," for there can only be technically a subscribing witness to a written will; but if a construction be given this section in conformity with the manifest intention of the lawmakers we will treat "subscribing witness" as having been used as synonymous with "attesting witness," or a witness by whose testimony a will must be established.

We are cited by counsel for proponent to a well-written opinion from the Supreme Court of Georgia in the case of Smith v. Crotty, 112 Ga. 905, 38 S. E. 110, in which it was held that under the statutes of that state the words "subscribing witness" could only be held to apply to a witness to a written will. The statute construed in the case just cited is as follows: "If a subscribing witness is also a legatee or a devisee under the will, the witness is competent, but the legacy or devise is void." It will be noted that this statute does not apply to legacies and devises under any will, and it specifically makes the witness competent to testify, but renders the legacy void. Now, in the case at bar, it would be purely paradoxical to hold that two of the attesting witnesses, who are the legatees under the will and sole heirs at law of the deceased, might be permitted to testify, but could take no legacy under the will, for the effect of such a holding as this would be to leave the decedent intestate, and to admit to probate an alleged will that would neither bequeath nor devise any property to any one. We are therefore compelled to conclude that neither of the legatees named in this will are competent witnesses to establish the will.

There is another question urged for consideration, and that is as to whether the proof is sufficient to establish the fact that the will offered for probate was made at the time of the last sickness of the deceased. The expression "last sickness" or "last illness" occurs in nearly all American statutes providing for nuncupative wills, and is borrowed from the English statute, 29th Charles the Second, of which our own statute is a practical re-enactment. The leading American case which construes the term "last sickness" in statutes of wills was written by the learned Chancellor Kent in Prince v. Hazleton, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, and it was there held, by a divided court, however, that the term "last sickness" was equivalent to meaning "in extremis," or an illness or sickness so violent that the testator had not time, nor opportunity, nor means at hand, after making his oral will, to make a written will in legal form. This decision is generally commended by the text-writers, and has been followed in Bellamy v. Peeler, 96 Ga. 467, 23 S. E. 387; Donald v. Unger, 75 Miss.

294, 22 South. 803; Reese v. Hawthorn, 10 Grat. (Va.) 548; Carroll v. Bonham, 42 N. J. Eq. 625, 9 Atl. 371; In re Rutt's Estate, 200 Pa. 549, 50 Atl. 171; O'Neill v. Smith, 33 Md. 569. A more liberal view, however, of the meaning of this phrase has found favor in recent decisions of the Supreme Courts of Alabama, Tennessee, Illinois, and Kansas. Johnson v. Glasscock, 2 Ala. 218; Nolan v. Gardner, 7 Heisk. (Tenn.) 215; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290; Baird v. Baird, 70 Kan. 564, 79 Pac. 164, 68 L. R. A. 627.

Under the decisions last cited it is held that, where a verbal will is made in the last sickness, of which the testator dies, when such sickness has progressed to such a point that he expects death at any time, and realizes that he is liable to die therefrom at any time, and in view of such expected death, and as preparatory thereto, makes a will near to the time of his death, such will is made in the last sickness of the testator, although a sufficient time may have intervened between the making of the oral will and the death of the testator to have permitted the making of a written will. We are inclined to think that this rule is all that a fair interpretation of the statute requires, and that a sufficient precaution to prevent imposition and fraud on the estates of decedents is taken by the courts when strict proof is required by disinterested witnesses that the words spoken were intended as the last will of the decedent, and that the witnesses present, or some of them, were called upon to bear witness of such fact. We think that the evidence was probably sufficient to sustain the verdict of the jury on the question that the will offered for probate was made in the last sickness of the deceased.

In view of the conclusion to be reached, it is not necessary to determine the question whether real estate is a subject of devise by nuncupative will under our statute. The only question involved in this controversy at the present time, and now before us for adjudication, is whether or not the will offered in the county court shall be admitted to probate as the last will and testament of the deceased, and because of the interest of one of the attesting witnesses and the incompetency of the other, as before set out, there is not sufficient competent evidence to sustain the judgment, and we therefore recommend that the judgment of the district court be reversed, and the cause be remanded for further proceedings.

AMES and LETTON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause is remanded for further proceedings.[7]

[7] See In re Miller's Estate, 47 Wash. 253, 91 Pac. 967, 125 Am. St. Rep. 904, 13 L. R. A. (N. S.) 1092 (1907), 3 Am. & Eng. Ann. Cas. 317, note. On rogatio testium, see Dawson's Appeal, 23 Wis. 69 (1868); Wiley's Estate, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep. 569 (1898), 10 Am. & Eng. Ann. Cas. 1132, note. "A nuncupative will is where the testator, without any writing, declares his will or testament, as to personal estate, before two witnesses. * * * In England there must be three witnesses. No case was produced

In re DAVIS' WILL.

(Supreme Court of Wisconsin, 1899. 103 Wis. 455, 79 N. W. 761.)

CASSODAY, C. J.[8] It appears from the record: That August 18, 1896, at 5 o'clock a. m., Russell E. Davis died at his home in Milwaukee, leaving a nuncupative will spoken a few hours before, and during his last sickness, and which was thereupon reduced to writing, as follows: "I give unto my wife the income of my entire estate during her widowhood. If she shall remarry, she is to have one-third of my estate, and the other two-thirds is to go to my children. Upon the death of my wife, my whole estate is then to go to my children. I appoint my brother Oscar F. Davis my executor." * * *

The only question for consideration is whether the words so spoken, and constituting the nuncupative will of the deceased, were effectual to pass the income of the real estate to the widow. The statute declares, in effect, that the owner of "lands," or of any interest therein, "may devise and dispose of the same by last will and testament in writing; and all such estate not disposed of by will shall descend as the estate of an intestate," etc. Rev. St. § 2277. This includes the right to "devise" the homestead. Id. § 2280. The statute also declares that "the word 'land' or 'lands,' and the words 'real estate' and 'real property' shall be construed to include lands, tenements and hereditaments and all rights thereto and interests therein." Rev. St. § 4971, subd. 9; Id. § 2025. The statute also declares that every competent person, "may, by last will and testament in writing, bequeath and dispose of all his or her personal estate remaining at his or her decease," etc. Id. § 2281. All wills, except nuncupative wills, must be in writing, and executed as prescribed. Id. § 2282. And the statute further declares that "no nuncupative will shall be good when the estate bequeathed

* * * where it was held that a decedent, who intended to make a written will, which, for any cause, was left incomplete or unfinished, died testate by nuncupation of the unfinished will. I have met with but one case, that of Offutt v. Offutt, 3 B. Mon. 162, 38 Am. Dec. 183, where it was ruled that a paper not perfected as a written will may be established as a nuncupative will, where its completion is prevented by the act of God. But this depended much on the peculiarity, or rather distinctive character, of the Kentucky statute. * * * There ought, therefore, to be present, in order to constitute a nuncupative will, not only the animus testandi, but the mind and intent to nuncupate." Coulter J., in Porter's Appeal, 10 Pa. 254, 258, 259 (1849). See, also, Kennedy v. Douglas (N. C.) 66 S. E. 216 (1909).

In Re Miller's Estate, supra, it was held that upon the probate of a nuncupative will the court, in the exercise of a sound discretion, may permit the alleged will and its records to be amended to conform to what the facts show was the will of the testator.

On nuncupative wills, see 11 Prob. Rep. Ann. 13, note; 67 Am. St. Rep. 572, note; 20 Am. Dec. 44, note; 2 Prob. Rep. Ann. 171; 5 Am. Prob. Rep. 391, note; 8 L. R. A. 40, note; 9 L. R. A. 829, note; 3 Am. & Eng. Ann. Cas. 317, note; 10 Am. & Eng. Ann. Cas. 1132, note; 14 Am. & Eng. Ann. Cas. 1164, note.

[8] Part only of the opinion is given

shall exceed the value of $150 that is not proved," as therein prescribed. Id. § 2292.

The old English statute, of which that section is almost a literal copy, used the words "the estate thereby bequeathed." Act 29 Car. II. c. 3, § 19. The word "bequeath" is commonly used with reference to the disposition of personal property; and the word "devise," with reference to the disposition of real property. Cent. Dict.; And. Law Dict.; Schouler, Wills, §§ 3, 513; In re Fetrow's Estate, 58 Pa. 427. To hold that real estate could be disposed of by a nuncupative will would be repugnant to other provisions of the statutes requiring conveyances of and contracts relating to real estate to be in writing. Rev. St. §§ 2302, 2304. We must hold that under our statutes a nuncupative will is inoperative to transfer title to real estate. This is in accord with the rulings of other courts under similar statutes. Sadler v. Sadler, 60 Miss. 251; McLeod v. Dell, 9 Fla. 451; Smithdeal v. Smith, 64 N. C. 52; Palmer v. Palmer, 2 Dana (Ky.) 390; Page v. Page, 2 Rob. (Va.) 424; Lewis v. Aylott, 45 Tex. 190; Pierce v. Pierce, 46 Ind. 86. But this does not prevent such will from being effectual as to the personal property. McLeod v. Dell, supra. * * *

We must hold that the will was inoperative in so far as it attempted to dispose of the income of the real estate. The judgment of the circuit court is affirmed.[9]

SECTION 4.—CONDITIONAL WILLS

In re GOODS OF SMITH.

(Court of Probate, 1869. L. R. 1 P. & D. 717.)

LORD PENZANCE.[10] The codicil in question contains this clause: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." Now the proposition is clear that the mere fact that a part is in the form of a will, will not necessarily shew that it is testamentary. There must have been in the execution of it an animus testandi; the testator must have intended that the paper shall operate as a will. There have been cases in which persons have signed and executed with the formalities required by law papers in all outward respects wills, but which, it has afterwards been proved to the satisfaction of the court, were executed in joke or for some collateral object. What the testator has tried to do in this case is, he has endeavoured to leave it to his wife to say whether or no this testamentary paper shall be operative or not. He has declared it to be operative or not according to a certain event, namely, his wife's

[9] See Mulligan v. Leonard, 46 Iowa, 692 (1877).

[10] The statement of facts is omitted.

determination. The court will be anxious to carry out his wishes, if it be able to do so within the provisions of the law; and the question is, whether the object of the testator is illegal.

I think not. It is true that a testator cannot confide to another the right to make a will for him, and it is equally true that he cannot leave to another a power to revoke his will after his death, because the statute says that wills shall be revoked only in the manner prescribed by it, and if a will be destroyed by some person other than the testator, it must be destroyed in the presence of the testator, and by his direction, but there is nothing in the statute to prevent a man from saying that the question whether a paper shall be operative or otherwise shall depend upon an event to happen after his death. Neither common sense nor the words of the statute are opposed to such a proposition. In Parsons v. Lanoe, 1 Ves. Sr. 190, Lord Chancellor Hardwicke said: "It has been argued that although the dispositions might be made conditional and contingent, yet it was impossible to make the instrument so. If the entire disposition is made so, the consequence will be the same; but though it be truly said that in the several chapters of Swinburne of conditions, there is no instance of the instrument of the will being made eventual, I am very clear, without the help of an authority, that a will or codicil may be entirely depending on a contingency, so as to have no effect as an instrument, unless that event happened, nor should it be proved in the Ecclesiastical Court."

I think the intention of the testator in this case was lawful, and as his wife has exercised her option by refusing to recognize the second codicil as testamentary, I decree probate of the will and first codicil only.

EATON v. BROWN.

(Supreme Court of the United States, 1904. 193 U. S. 411, 24 Sup. Ct. 487, 48 L. Ed. 730.)

Mr. Justice HOLMES delivered the opinion of the court.

The question in this case is whether the following instrument is entitled to probate:

"Washington, D. C. Aug. 31" /001.

"I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession Mr H H Brown to go to the Methodist Church at Bloomingburgh. All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C, All I have is my one hard earnings and and I propose to leave it to whome I please.

"Caroline Holley."

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and setting up

that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the Supreme Court with costs against the appellant, and this decree was affirmed by the Court of Appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicile of the testatrix in Washington was not admitted in terms. But the Court of Appeals assumed the allegation of the petition that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition, but as these are denied by the answer they do not come into consideration here.

It might be argued that logically the only question upon the probate was the factum of the instrument. Pohlman v. Untzellman, 2 Lee, Eccl. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted facts, that it is inoperative in the event which has happened. Parsons v. Lanoe, 1 Ves. Sr. 189; S. C., Ambler, 557; 1 Wils. 243; Sinclair v. Hone, 6 Ves. 607, 610; Roberts v. Roberts, 2 Sw. & Tr. 337; Lindsay v. Lindsay, L. R. 2 P. & D. 459; Todd's Will, 2 W. & S. 145. The only question therefore is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed that grammatically and literally the words "if I do not" [return] are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of the opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." Damon v. Damon, 8 Allen (Mass.) 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in In the Goods of Porter, L. R. 2 P. & D. 22, 23; and it is almost a commonplace. In the case at bar we have an illiterate woman writing

her own will. Obviously the first sentence, "I am going on a journey and may not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. Cody v. Conly, 27 Grat. (Va.) 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands.

We need not consider whether if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent—one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. Skipwith v. Cabell, 19 Grat. (Va.) 758, 783. And then she goes on to say that all that she has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the absence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which on the face of it has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach, Parsons v. Lanoe, Lord Hardwicke emphasizes the proposition that under the circumstances of that case no court of equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland and had several children. If the will stood the children would be disinherited, and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. Ambler, 561; 1 Ves. Sr. 192.

It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention, now is that if I should not return (which I will, no preventing Providence)." Todd's Will, 2 W. & S. 145. There the language in the clearest way showed the alternative of returning to have

been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was In the Goods of Porter, L. R. 2 P. & D. 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See In the Goods of Mayd, 6 P. D. 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of some of the earlier ones. In the Goods of Mayd, 6 P. D. 17; In the Goods of Dobson, L. R. 1 P. & D. 88; In the Goods of Thorne, 4 Sw. & Tr. 36; Likefield v. Likefield, 82 Ky. 589, 56 Am. Rep. 908; Bradford v. Bradford, 4 Ky. Law Rep. 947; Skipwith v. Cabell, 19 Grat. (Va.) 758, 782–784; French v. French, 14 W. Va. 458, 502. Decree reversed.[11]

SECTION 5.—JOINT AND MUTUAL WILLS

GERBRICH v. FREITAG.

(Supreme Court of Illinois, 1905. 213 Ill. 552, 73 N. E. 338, 104 Am. St. Rep. 234.)

CARTWRIGHT, J.[12] An instrument in writing executed by Ulrich Von Gans and Hannah Von Gans, husband and wife, was offered for probate in the county court of McLean county as the will of said Hannah Von Gans, who died February 15, 1903, leaving, surviving her, her said husband, Ulrich Von Gans, five children by her former hus-

[11] In In the Estate of Thomas Vines, [1910] P. 147, a will beginning, "If anything should happen to me while in India," was held not to be conditional. In so holding Bigham, P., said: "It is perhaps sufficient to say that the rule appears to be that, where a will is made in terms subject to the happening of an event, that event must occur before it can become operative; whereas, if the possibility of an event happening is stated merely as the reason for making the will, the will becomes operative, whether the event happen or not. To give an illustration: If a man write, 'Should I die to-morrow, my will is' so and so, his death must occcur [at that time] to make the document operative; whereas, if he write, 'Lest I die tomorrow,' it will be operative, whether he die or not on the morrow. But the question always depends on the wording of the instrument, and, reading the instrument before me, I come to the conclusion that it is not conditional." Pages 149, 150.

On provisional alternative wills, see Hamilton's Estate, 74 Pa. 69 (1873). On simultaneous wills, see Townsend v. Moore, [1905] P. 66. On conditional wills, see 8 Am. & Eng. Ann. Cas. 1150, note; 9 Prob. Rep. Ann. 631, note; 1 Am. Prob. Rep. 396, note.

[12] Part only of the opinion is given.

band, Freitag, and Henrietta Ernestine Von Gans, named in the instrument as the daughter of said Ulrich and Hannah. Appellant, who is one of the children of the former marriage, and who was given by the instrument $1, with the statement that she had received other valuable consideration in advance, objected to the probate of the instrument as a will, both because it was not executed according to law, and because it was not such an instrument as could be probated as the will of Hannah Von Gans. The county court admitted the will to probate, and appellant appealed to the circuit court, where it was again admitted to probate, and this is an appeal from the order of the circuit court.

The objection made to the instrument is that it is a joint will, incapable of being probated as the will of Hannah Von Gans while the other maker, Ulrich Von Gans, is living. Two persons may at the same time execute separate wills disposing of their property, and there is no legal objection to uniting the wills in a single instrument if it is such that it may take effect upon the death of one of the parties, so far as it relates to the property of that one. The fact that husband and wife devise their property reciprocally to each other by the same instrument, or that it is a joint or mutual will, does not deprive it of validity, if the will can be given effect on the death of either, so far as the property of that one is concerned. If it is of that character, it may be probated upon the death of one as his or her separate will, and, upon the death of the other, can be again proved as the separate will of the other. Unless the provisions of the instrument are such that the disposition of the property is suspended after the death of one until the death of the other, so that it cannot be executed as the separate will of the deceased party, it is no objection that there is but a single instrument. In re Davis, 120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771; Betts v. Harper, 39 Ohio St. 639, 48 Am. Rep. 477; Estate of Cawley, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93; Evans v. Smith, 28 Ga. 98, 73 Am. Dec. 751.

In this case the instrument was declared by the parties to be their joint last will and testament. Hannah Von Gans was the owner of 280 acres of land, and also of an undivided one-half of 119 acres of which she and her husband, Ulrich Von Gans, were tenants in common; he owning the other undivided one-half. These lands were their only property. The will provided that the just debts and funeral expenses of the makers should be paid, including a mortgage for $10,000 on the lands, and directed that the five children to whom the lands were devised should each assume the sum of $2,000, or such equalized portion of the mortgage as might remain unpaid at the time of their death. The lands were devised to four of the children of Hannah Von Gans, excluding appellant, and to Henrietta Ernestine Von Gans, in tracts of 80 acres each, except one tract, which was 79 acres. One of the daughters was to pay to John Freitag, one of the sons, a note given to the testator and testatrix for cash loaned to her husband. The will contained the following provision: "Each parcel of said land

to pass into the possession of our devisees at our, one or the other, demise, and each devisee to pay the survivor a current rate of rent per acre on said land so devised during his or her natural life, together with the taxes, interest on mortgage," etc.

The will was written by a friend of the parties, who had been in the grocery business, and who was unskilled in such matters. They had been in the habit of trading with him, and he wrote the will from deeds furnished by them. While the forms of expression used are not the same as would have been employed by one more experienced in writing wills, we find no especial difficulty in determining the intent of the parties. By the will, each one devised his or her own property, with the provision that each parcel should pass into the hands of the devisees at the death of the owner; but such devisee was to pay to the survivor, during his or her natural life, the current rate of rent per acre, as well as the taxes and interest on the mortgage. The possession being subject to the payment of the current rate of rent, together with the taxes and interest on the mortgage, or such part as might remain unpaid, the survivor would be entitled to the full beneficial use of the land for his or her life. That beneficial use in the lands devised by Hannah Von Gans became vested in Ulrich Von Gans upon her death, and it would only come to an end, and the land be freed from the rent charge, upon his death. There is nothing in these provisions which suspended the disposition of the property or the operation of the will until the death of Ulrich Von Gans, but the instrument is, in effect, two distinct wills, which may be probated separately, and be successively proved as the separate will of each maker. * * *

The judgment of the circuit court is affirmed. Judgment affirmed.[13]

STONE v. HOSKINS.

(High Court of Justice, Probate Division. [1905] P. 194.)

The plaintiffs, as executors, claimed probate of a will, dated February 1, 1904, of Emily Hoskins, who died on March 3, 1904.

The defendant, who was the husband of the testatrix, propounded an earlier will, dated November 21, 1900, and alleged that, both before and after the marriage, he and his wife agreed to make mutual wills, and that this agreement or arrangement was carried into effect on November 21, 1900; and he further alleged that the testatrix secretly and without notice to him and contrary to the said arrangement purported to revoke her said will and to make a fresh one. He counterclaimed that the Court should pronounce against the fresh will, and, alternatively, that the executors of the later will, if the same were ad-

[13] See, also, Peoria Humane Society v. McMurtrie, 229 Ill. 519, 82 N. E. 319 (1907).

mitted to probate, should be directed to hold the property of the testatrix in trust for the persons benefited under the earlier will.

Sir GORELL BARNES, President.[14] * * * There remains a legal point of considerable interest. These were no doubt mutual wills made in accordance with an arrangement. The testatrix departed from that arrangement and shortly afterwards died, the husband not hearing of that departure till after her death; and he now claims that in the event, which happened, of my pronouncing for the will, the executors of it should hold the property passing under it on the trusts of the arrangement.

The contention of the defendant is this—that as there was this arrangement prior to the marriage, and it has been carried out by the wills of 1900, and he has not departed from the arrangement on his part, he ought to have a declaration that matters still stand on the basis of the arrangement. On the other hand the point is made that the arrangement contemplated by its very nature a power to revoke it in certain circumstances, i. e., that it is not of the character of a settlement, and the fact that it was to be carried out by making wills indicates its revocability. Unless the deceased died standing by her will, so to speak, she could depart from the arrangement by her husband's consent or notice given to him. It is, I know, objected here that notice was not given. * * *

It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because, by the death of the other party, the will of that party and the arrangement have become irrevocable;[15] but that case is entirely different from the present, where the first person to die has not stood by the bargain and her "mutual" will has in consequence not become irrevocable. The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death. I cannot see that the cases cited support the

[14] The statement of facts is abbreviated, and part only of the opinion is given.

[15] "It is evident from the provisions of the mutual or joint will that this aged or infirm couple, each owning property, made said will together for the purpose of disposing of and distributing their property equitably among their children after their death, that the provisions of the will were reciprocal, and that but for these mutual bequests the parties would in all probability have made separate wills. After the death of the testatrix, her husband, William Daniel, accepted the provisions of the will in his favor, and under such circumstances equity will enforce the provisions of the will against him and all persons holding under him who took with notice of its provisions or without value. Courts have gone even further, and held that, if the survivor is threatening to dispose of his property in violation of the provisions of the will, they will grant relief by way of injunction, upon application of the children who would be prejudiced thereby." Bower v. Daniel, 198 Mo. 289, 321, 95 S. W. 347, 357 (1906).

proposition for which the defendant contends, with the result that he must, I think, fail to obtain the declaration which he seeks. I pronounce for the will of 1904.[16]

[16] But see Turnipseed v. Sirrine, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580 (1900).

"A joint will contained in a single instrument is the will of each of the makers, and at the death of one may be probated as his will and be again probated at the death of the other as the will of the latter. Wills may be joint or mutual, or both joint and mutual. A 'joint will' is one where the same instrument is made the will of two or more persons and is jointly signed by them. It is not necessarily either mutual or reciprocal. 'Mutual wills' may be defined as the separate wills of two persons which are reciprocal in their provisions. A will that is both joint and mutual is one executed jointly by two or more persons, the provisions of which are reciprocal, and which shows on its face that the devises are made one in consideration of the other. These several classes of wills have some characteristics that distinguish them one from the other. A joint will which is not reciprocal is simply the individual personal will of each of the persons signing the same and is subject to the same rules that would apply if the wills were several. Mutual wills—that is, where two persons execute wills reciprocal in their provisions but separate instruments—may or may not be revocable at the pleasure of either party, according to the circumstances and understanding upon which they were executed. To deprive either party of the right to revoke such mutual will it is necessary to prove, by clear and satisfactory evidence, that such wills were executed in pursuance of a contract or a compact between the parties, and that each is the consideration for the other; and, even in cases where mutual wills have been executed in pursuance to a compact or agreement between the parties, the law appears to be well settled that either party may, during the lifetime of both, withdraw from the compact and revoke the will as to him. A joint and mutual will is revocable during the joint lives by either party, so far as relates to his own disposition, upon giving notice to the other; but it becomes irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other." Vickers, J., in Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216–218 (1909).

For discussions of joint and mutual wills, see 12 Prob. Rep. Ann. 64, note; 68 Am. Dec. 407, note; 38 L. R. A. 289, note.

CHAPTER VI

THE EXECUTION OF WRITTEN WILLS AND TESTAMENTS

SECTION 1.—STATUTES[1]

THE STATUTES OF WILLS

By the Statute of 32 Hen. VIII, c. 1 (1540), it is provided that all and every person and persons having manors, lands, tenements, or hereditaments "shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments or any of them ['holden in socage' and two-thirds part of his said manors, lands, tenements or hereditaments 'holden by knight's service'] at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding." [2]

By the Statute of 34 & 35 Hen. VIII, c. 5 (1542), lands devisable were confined to "estates in fee simple only"; [3] but a person seised in fee simple in severalty, in coparcenary or in common, "in possession, reversion, remainder, or of rents or services incident to any reversion or remainder" is given the right to devise "to any person or persons (except bodies politik and corporate) by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, by himself solely, or by himself and other jointly, severally or particularly, or by all those ways, or any of them, as much as in him of right is or shall be" all of his socage and two parts out of three—i. e., two-thirds—of his knight's service "manors, lands, tenements, rents and hereditaments, or any rents, commons, or other profits out of or to be perceived of the same, or out of any parcel thereof." [4]

[1] For convenience of reference, the provisions as to competency of witnesses are given post, pp. 186–188.

[2] The language quoted and not bracketed is from section I of the statute.

[3] See section III of the statute.

[4] The language quoted is from section IV of the statute.

THE STATUTE OF FRAUDS

V. And be it further enacted * * * that * * * all devises and bequests of any lands or tenements * * * shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

29 Car. II, c. 3, sec. V (1676).

THE WILLS ACT

I. Be it enacted * * * that the words and expressions hereinafter mentioned * * * shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say), the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child * * * and to any other testamentary disposition.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in the manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

7 Wm. IV & 1 Vict. c. 26, §§ I, IX, X, XIII (1837).[5]

[5] For the provision of the Wills Act defining the wills and estates to which the act did not extend, see section XXXIV of the act in the appendix, post, p. 767.

THE WILLS ACT AMENDMENT ACT, 1852.

Be it therefore enacted * * * (as follows):

I. * * * Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment [the Wills Act], as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature, * * * but no signature under the said [Wills] Act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

15 & 16 Vict. c. 24, § I (1852).

SECTION 2.—TESTATOR'S KNOWLEDGE OF THE INSTRUMENT'S CONTENTS

BEYER et al. v. HERMANN et al.

(Supreme Court of Missouri, Division No. 1, 1903. 173 Mo. 295, 73 S. W. 164.)

MARSHALL, J.[6] This is an action to contest the will of Anna Hermann, née Burger. * * *

2. The second charge is that the will was not executed according to law.

[6] Part only of the opinion is given.

The plaintiffs claim that the justice prepared a will, and read it and explained it to the decedent, and that in attempting to sign her name to it she dropped the pen and blotted the paper, and thereupon the justice recopied the will, and, without reading or explaining the copy to her, it was executed, she making her mark, and the witnesses signing their names.

The testimony of the justice is not altogether clear as to whether he read the will to the decedent after he recopied it or not. It is susceptible of the construction that he did, and also that he did not do so. But whether he did or not, it is uncontradicted that the copy was a true copy of the will that was spoiled by being blotted, and that the spoiled will was read and explained to her, and in fact was drawn as she directed. This being true, she knew the contents of the copy as well as she did of the first draft, and she declared to the witnesses, when she executed the copy, that it was her will. This fills the requirements of the law that she shall know the contents. Berberet v. Berberet, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634. She could not read written English, so she had to depend upon the justice to know the contents of the will. He could impart such knowledge to her either by reading the will or explaining its contents to her. In either case she would only know what he read or what he said about it. She would not know whether he read what was written or what he said he had written. Therefore she had to rely upon the integrity of the justice to read or explain correctly what he had written. No one else would know whether he had done so or not. This being true, it can make no difference in law that the copy was not read to her, for she would still be in the dark as to whether it was a true copy or not, and also whether either was as it was read or explained to be. The first draft was read to her, correctly, so the justice says, and so it must be taken, because no one else could know whether it was or not. The copy was a true copy of the first draft, whose contents she knew, so the justice says, and so it must be, for no one else could know whether it was or not. The whole matter, therefore, rests upon the integrity of the justice, and there is no more reason for doubting that the copy is a true copy than there is for doubting that the justice (or any one who writes a will) read or explained it correctly and accurately.

This charge must, therefore fail, and the will be regarded as being executed according to law. * * *

Finding no error in the record, the judgment of the circuit court is affirmed. All concur.[7]

[7] See Lipphard v. Humphrey, 209 U. S. 264, 28 Sup. Ct. 561, 52 L. Ed. 783 (1908). In Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289 (1907) the testatrix instructed the person whom she wanted to appoint trustee under her will to have a will drawn making certain dispositions of property. The trustee had an entirely different will drawn and executed by the testatrix. The court declared (207 Mo., at pages 226–227, 105 S. W. 304) that "there is not a scintilla of evidence in this record which tends to show the testatrix had any knowledge whatever of the provisions of or contents of the will she was

SECTION 3.—TESTATOR'S SIGNATURE

BROWN v. SACKVILLE.

(Court of Common Bench, 1552–1558. Dyer, 72a.)

A man seised of lands in fee simple holden in socage (being sick in bed) sent for Mr. Atkins, a man learned in the law, and desired his counsel in making his will, who took notes of it, and afterwards departed from the devisor, and about eight of the clock in the morning put the said will in writing according to due form of law, agreeably to the said notes, and according to the said will declared unto him, which was wholly written before eleven o'clock of the same day, and the devisor died at twelve, so that he did not hear the said will read. Ex depositione Mr. Atkins. It was moved, whether this was a good will, or not? And by the opinion of THE COURT in the Bench in Easter Term, 4 & 5 Ph. & M. in a writ of quibus brought by Brown against Sackville, in evidence upon the trial of the issue nul disseisin, that such a will is good enough, and sufficient by the statute. So the same point was doubted upon the last will of Hinton of London in the court of wards, M. 4 & 5 Eliz., whereof articles were made in the second year of E. 6, ut supra, and read to the devisor by the scrivener, and written at length after his death, and holden as above well enough.[8]

BLACKWOOD v. DAMER.

(Court of Delegates, 1783. 3 Phillim. 458, note.)

M. Janssen wrote with his own hand instructions for a will, in which he left the residuum to his youngest daughter, since married to the Honorable Lionel Damer. The attorney, in writing over the will, omitted the residuary clause; some other variations were made; the draft was read over to the testator, and left in his custody two days; the will was executed in due form, contained legacies to the executors. The testator always afterwards expressed himself as having left the residuum to his youngest daughter. The attorney deposed, that it was merely an omission. The other variations he supposed he had received verbal instructions to make

signing" and directed the entry of a judgment rejecting the will. On the necessity of affirmative proof of knowledge by testator of the contents of the will, where the testator is unable to read, see 14 Am. & Eng. Ann. Cas. 876, note.

[8] But where the testator orally announced his will, and his statement was written in the form of a will, without any direction by him that it be done, and then was not read over to him, nor assented to by him, it was held not to be a will. Nash v. Edmunds, Cro. Eliz. 100 (1588).

The court below had pronounced for the instructions as part of the will.

THE DELEGATES decreed that the residuary clause should stand as part of the will, but no other part of the instructions.[9]

LEMAYNE v. STANLEY.

(Court of Common Pleas, 1681. 3 Lev. 1.)

In ejectment upon Not guilty, and a special verdict, the case was: Stanley seised in fee writ his will with his own hand; beginning, "In the name of God, Amen, I John Stanley make this my last will and testament," and thereby devised the lands in question, and put to his seal, but did not subscribe his name, only had it subscribed by three witnesses in his presence; and all this was done after 29 Car. 2, against Frauds and Perjuries; and whether this was a good will to pass the lands, was the question. And after several arguments it was adjudged by the whole court, sc. NORTH, WYNDHAM, CHARLTON, and LEVINZ, to be a good will; for being written by himself, and his name in the will, it is a sufficient signing within the Statute, which does not appoint where the will shall be signed, in the top, bottom, or margin, and therefore a signing in any part is sufficient. And per NORTH, WYNDHAM, and CHARLTON, the putting of his seal had of itself been a sufficient signing within the Statute; for signum is no more than a mark, and sealing is a sufficient mark that this is his will; but LEVINZ doubted of this upon the case in Roll. 1 Abridgm. 245, § 25. Submission to an award ita quod it be made, signed, and delivered, the arbitrator makes an award, and delivers it, but does not sign it: ET PER CUR'. It is not good; but all agreeing upon the other reason, judgment was accordingly given for the defendant.

EVERHART et al. v. EVERHART.

(Circuit Court, S. D. Mississippi, W. D., 1888. 34 Fed. 82.)

HILL, J.[10] * * * With the purpose of settling the rights of the parties without further litigation, as I suppose, both parties request me to determine whether or not the proof of the subscribing witnesses taken before the clerk of the chancery court of Issaquena county, and upon which the paper writing was admitted to probate by the clerk in common form, is sufficient to establish the validity of the paper writing as the last will and testament of said M. Everhart, so as to vest the title to the lands in controversy in the defendant.

[9] The delegates were Mr. Justice Willes, Mr. Baron Eyre, Mr. Justice Nares, and Dr. Machum.

[10] Part only of the opinion is given.

The testimony is quite brief, and is in substance as follows: That said M. Everhart requested one of the witnesses to write his will, which he did, as dictated by said Everhart; that when it was written said Everhart attempted to sign it, but from physical debility was unable to do so, but in the attempt made a small mark or scratch on the paper, and failed to do more; that he said he made and published the paper as his last will and testament. The paper writing shows a small mark or scratch on the left-hand corner, but no name attached to it. There are also two small marks or dots on another part of the paper, very dim, and look as though made with the point of a pencil, and not at the usual place for signing such a paper, by the party executing it. The name of M. Everhart only appears in the commencement of the paper, which it is evident was not intended as a signature of the testator. The draughtsman was not requested to sign the testator's name, and the testator's effort to sign the paper himself shows that he did not recognize the signature made in the commencement of the writing by the draughtsman as his signature.[11] The place where made, and the character of the small marks and dots, furnish no evidence that they were made as a substitute for the signature of the testator.

It is true that a testator may sign his will by making a mark, but he must intend the mark as a substitute for his name; and when there is no name written, or anything indicating who made the mark, and especially when the mark is made at an unusual place for the signature, it ought to require very satisfactory evidence that the mark was intended by the testator as his signature, or as a substitute for it. As already stated, to make a will valid to pass the title to real estate, under the laws of this state, it must be in writing and signed by the testator, or by some other person in his presence, and by his special direction. This paper writing was not signed by any other person. I am satisfied that the proof exhibited with the paper writing as the proof upon which it was admitted to probate by the clerk of the chancery court, fails to show that the testator intended the marks made by him to be a substitute for his signature, if indeed he knew that he had made them at all.

I am satisfied, looking at the face of the paper propounded as the last will of said M. Everhart, and the proof of the subscribing witnesses exhibited with it, that this paper cannot be held a valid will, so as to vest the defendant with the title to the lands described in the bill. But if the defendant desires so to do, he can answer the bill, when an

[11] In Armstrong's Ex'r v. Armstrong's Heirs, 29 Ala. 538 (1857), a will reading "I, James Armstrong," etc., dictated by the testator and read over and approved by him, was held to be a valid will. The "James Armstrong" dictated at the beginning of the will was deemed the signature of the testator, put there by another person in his presence and by his direction. See Adams v. Field, 21 Vt. 256 (1849). For a discussion of the admissibility of parol evidence to show the testator's intent to treat his name at the beginning as a signature, see 42 Am. Dec. 571, note; 70 Am. Dec. 442, note. See, also, Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775 (1890).

issue will be made up to be tried by a jury upon the evidence produced by both parties; and upon such trial what is here said will have no influence with either court or jury, but the cause will be determined as though these remarks had never been made, or even conceived.[12]

RILEY v. RILEY.

(Supreme Court of Alabama, 1860. 36 Ala. 496.)

The proponent of the will of William M. Riley offered T. J. Robbins as a witness, who testified that he wrote the instrument propounded for probate at the request of said W. M. Riley, and subscribed said Riley's name to it as testator, at his request, in his presence, and by his direction; that he also wrote the name of Martha O. Nettles as a subscribing witness thereto, at the request of said Riley; that said Martha O. Nettles was present at the time, and did not object to his writing her name, but assented and agreed thereto; that said Riley requested him to write the name of said Martha O. Nettles as a witness to said instrument, saying that he (witness) could write better than she could; that said Martha O. Nettles could read and write very well—perhaps better than himself; and that he also subscribed his own name as a witness to said instrument. Martha O. Nettles testified in corroboration. Over objection the court left it to the jury to say whether the will was duly attested.

R. W. WALKER, J.[13] 1. The decree in this case must be reversed. It was for the court to determine what facts were necessary to estab-

[12] On signing by mark, see 4 Prob. Rep. Ann. 258; 22 L. R. A. 370, note. On a signature by mark made by one able to write, see In re Pope, 139 N. C. 484, 52 S. E. 235, 7 L. R. A. (N. S.) 1193, 111 Am. St. Rep. 813 (1905); Main v. Ryder, 84 Pa. 217 (1877). The mark of testator is effective as a signature, although in writing the testator's name next to the mark the scrivener misspells it. Succession of Crouzeilles, 106 La. Ann. 442, 31 South. 64 (1901). Or puts down a wrong first name. Rook v. Wilson, 142 Ind. 24, 41 N. E. 311, 51 Am. St. Rep. 163 (1895). The mark may consist of an X, Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372 (1896); or of the testator's first name, Estate of Knox, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798 (1890); or of his whole name misspelled by him, Succession of Bradford, 124 La. 44, 49 South. 972 (1909); or of his whole name stamped at the proper place, Jenkins v. Gaisford, 3 Sw. & Tr. 93 (1863). That the hand of testator may be guided in signing his name or making his mark, see Wood v. Rhode Island Hospital Trust Co., 27 R. I. 295, 61 Atl. 757 (1905); 5 Prob. Rep. Ann. 418, note.

"The statute, in authorizing the execution of a will by a mark, can only mean a mark made with the intent to execute the will thereby. Without such intent, paraphrasing the language of Chief Justice Gibson in Greenough v. Greenough, 11 Pa. 497, 51 Am. Dec. 567 (1849) 'a cross, or a scratch, or a scrawl, or a dot, or a dash * * * imports no more than would a blot or a stain, or any other accidental discoloration of the paper at the foot of the instrument.'" Mitchell, J., in Plate's Estate, 148 Pa. 55, 59, 23 Atl. 1038, 33 Am. St. Rep. 805 (1892).

[13] The statement of facts is abbreviated, and part only of the opinion is given. See further report post, p. 183.

lish the signing and attestation of the will, within the meaning of the Code. But the effect of the charge given was to refer the decision of this legal question to the jury. Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Wright v. Bolling, 27 Ala. 259.

As, however, the main questions presented by the record will doubtless arise on another trial in the probate court, we deem it proper to express our views in regard to them at this time.

2. In order to constitute a valid signing of a will by the testator, it is not essential that he should write his own name. The statute expressly allows the will to be signed by another for him; and his name, when written by another for him, in his presence, and by his direction, will have the same effect as if written by himself. Armstrong v. Armstrong, 29 Ala. 541; 1 Wms. Ex'rs, 69; Code, § 1611. And though Lord Sugden has expressed a contrary opinion, it seems to be settled that such signing for the testator may be made by a person who is one of the subscribing witnesses to the will. In re Baily, 1 Curteis, 914; Smith v. Harris, 1 Robertson's Eccl. R. 262; 1 Wms. Exrs. 69–70. * * * Decree reversed and cause remanded.[14]

In re SEAMAN'S ESTATE.

ALBRIGHT et al. v. NORTH et al.

(Supreme Court of California, 1905. 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53.)

PER CURIAM.[15] A document purporting to be the last will and testament of Henry Seaman, deceased, was presented to the superior court, and an application for its probate was denied upon the ground that it had not been properly executed, in that the name of the testator was not subscribed at the end thereof. From the judgment thus entered, the present appeal has been taken.

The instrument was written upon a printed form or blank consisting of four pages folded in the middle, like ordinary legal cap. Upon

14 See Elston v. Montgomery, 242 Ill. 348, 90 N. E. 3 (1909).

In Waite v. Frisbie, 45 Minn. 361, 363, 47 N. W. 1069, 1071 (1891). Gilfillan, C. J., for the court, announced a strict rule on the subject of the express direction by the testator that another sign for him. He said: "The direction to sign must precede the act of signing. Mere knowledge by the testator that another has signed, or is signing, without previous direction, and assent to or acquiescence in it, to be inferred from looks, or a nod of the head, or motion of the hand, or other ambiguous token, is not enough. We do not mean that the express direction must be in words. A person unable to speak may sometimes be able to convey his wish that another sign his name as unequivocally by gestures as though he spoke the words; but the meaning of such gestures must be as clear and unambiguous as the words, and the act of signing must be in obedience to the direction thus conveyed. It follows, from what we have said, that mere assent or acquiescence implied by, or to be inferred from, looks or gestures, when another suggests that A. or B. sign the name, is not such an express direction as the statute requires."

15 The concurring opinions of Beatty, C. J., and Angellotti, J., are omitted.

the upper portion of the first page was a printed heading and introduction, occupying about one-fourth of the page. In the printed form the remainder of that page and the entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and about one-fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of an executor, and a clause revoking all former wills, and immediately after this a testimonium clause, underneath which, and extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page are blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded, and at the top thereof, were the printed words: "The Last Will and Testament of," under which the scrivener had written, "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this, the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written, "Henry Seaman," and underneath his name the word "witness," and underneath that the names, "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank.

It was shown at the hearing that the decedent had written his name at that place in intended execution of his will, and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. It was also shown that, with the exception of these signatures, the instrument is in the same condition as it was when the decedent signed his name thereto.

The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the Legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his inheritance only by a compliance with this mode. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose only the intention of the Legislature, as expressed in the language of the statute, can be considered by the court, and whether the will, as presented, shows a compliance with the statute. Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St Rep. 104.

Section 1276, Civ. Code, requires every will, other than nuncupative or olographic, to be "subscribed at the end thereof" by the testator, in the presence of two attesting witnesses, each of whom must, in his

presence and at his request, sign his name as a witness "at the end of the will." This section is from the Revised Statutes of New York, adopted by that state in 1830. These provisions are incorporated into the Civil Code prepared for adoption by that state by David Dudley Field, and, in their report of a Civil Code to the Legislature of 1871, the code commissioners of this state refer to this Code as the source of the section. In considering the section the decisions of that state upon the same question are therefore entitled to great consideration. A similar statute was enacted in England in 1837 (St. 1 Vict. c. 26), but the decisions under that statute as to what constitutes the "end" of a will are inconsistent and contradictory. In the earlier cases the statute received a very liberal construction in reference to the amount or extent of blank space that might be left between the termination of the will and the signature of the testator, but afterwards the same judge who gave this construction, as did also the Privy Council in affirming his judgment, stated that he felt it necessary to construe the act more strictly, on the ground that the provision was intended to prevent any addition being made to the will after the deceased had executed it (Smee v. Bryer, 1 Robt. Eccl. 616; Williams on Executors, *67); and the statute was construed as requiring the name to be written immediately after the termination of the testamentary provisions, without any space whatever between them. It was in view of these different constructions of the statute that in 1852 Parliament passed an explanatory act (St. 15 Vict. c. 24) known as "Lord St. Leonard's Act," which provided that the will should be valid "if the signature be so placed at or after or following or under or beside or opposite to the end of the will, that it should be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," and that no such will should be affected by the circumstance that "a blank space shall intervene between the concluding end of the will and the signature," etc.; thus permitting an inquiry into the intention of the testator, contrary to the rule on that subject in this state. The provisions of this act are so directly opposed to section 1276, Civ. Code, that the decisions thereunder are not entitled to any consideration in interpreting the section. Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. See, also, Matter of Conway's Will, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796.

The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The "will" at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the "end thereof" is not the foot or physical end of the sheet of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which

constitute the will. "The act of authentication must take place at the termination of the testamentary disposition." McGuire v. Kerr, 2 Bradf. Sur. (N. Y.) 244. "To say that, where the name is, there is the end of the will, is not to observe the statute. That requires that, where the end of the will is, there shall be the name. It is to make a new law to say that, when we find the name, there is the end of the will. The instrument offered is to be scanned to learn where is the end of it, as a completed whole, and at the end thus found must the name of the testator be subscribed." Sisters of Charity v. Kelly, 67 N. Y. 409; Matter of O'Neil's Will, 91 N. Y. 522; Matter of Andrews, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294.

The requirement that the name shall be subscribed "at" the end of the will is not satisfied by having that name written at any place "after" the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity, require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter and the name, without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which would prevent its admission to probate. See Soward v. Soward, 1 Duv. (Ky.) 126.

Appellants have cited the case of Gilman's Will, 38 Barb. (N. Y.) 364, in which the written matter of the will terminated four lines above the bottom of the page where the testator signed his name, and in which the court said: "An instrument is signed at the end when nothing intervenes between the instrument and the subscription. The place named in the statute is the end. The end of an instrument in writing commences and continues until something else or some other writing occurs." This language may have been appropriate to the will then before the court, but, as a construction to be given to the statute, it does not meet with our approval, and is, moreover, inconsistent with the construction given in the above cases cited from the Court of Appeals of that state. Particularly do we dissent from the definition of "end" as given in the last sentence of the quotation.

The formalities which the Legislature has prescribed for the execution of wills are to provide against false and fraudulent wills, and to afford means of determining their authenticity. A very evident

purpose of requiring the testator's name to be subscribed at the end of the will is not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature. McGuire v. Kerr, 2 Bradf. Sur. (N. Y.) 244; Matter of O'Neil's Will, 91 N. Y. 516; Matter of Andrews' Will, 43 App. Div. 394, 60 N. Y. Supp. 141; s. c., affirmed, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294; Matter of Hewitt's Will, 91 N. Y. 261; Matter of Conway's Will, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; Soward v. Soward, 1 Duv. (Ky.) 126; Ramsey v. Ramsey, 13 Grat. (Va.) 664, 70 Am. Dec. 438; Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Wineland's Appeal, 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571. "The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions" (Sisters of Charity v. Kelly, 67 N. Y. 409) "or by judicial construction" (Matter of Whitney, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616), "or defeated by lax interpretation" (Glancy v. Glancy, 17 Ohio St. 134). "The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose." Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156.

It is immaterial that there is no charge of fraud in any particular case. A failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud. The statute in question was enacted to protect the wills of the dead from alteration. If opportunity for such alteration is permitted, the fraud may be so deftly accomplished as to prevent its discovery, and for this reason the construction to be given the statute should be such as will control the execution of all wills. "The legislative intent was doubtless to guard against fraud and uncertainty in the testamentary disposition of property by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons." Matter of the Will of O'Neil, 91 N. Y. 516.

It is true, as suggested by the appellants, that there is the same opportunity for fraudulent interpolations in the will if the testator should leave sufficient space therefor between the several items of his will. But it is a sufficient answer to this suggestion that the form in which the provisions of a will are drafted is no part of its execution, and that the Legislature has not attempted to prescribe the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be "executed and attested." See Heady's Will, 15 Abb. Prac., N. S. (N. Y.)

211; Matter of Collins, 5 Redf. Sur. (N. Y.) 20. In Estate of Blake, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135, the testator left a blank space of several lines between the items in which he disposed of his property and the items appointing an executor and revoking his former will. These last items were, however, testamentary provisions (Sisters of Charity v. Kelly, 67 N. Y. 415); and, as they constituted a part of his will, the end thereof was not reached until they had been written upon the paper, and, as his name was subscribed to the testamentary clause, which immediately followed these items, it was held that it was subscribed at the end of the will.

A question similar to the one involved herein was presented in Soward v. Soward, 1 Duv. 126. The statute of Kentucky required the witnesses, as well as the testator, to "subscribe" the will with their names, which the courts of that state construed to mean that they should write their names at the close of the will. In the will then before the court the witnesses wrote their names, as did the testator in the present case, on the outside or fourth page of the sheet after it had been folded, and across it as so folded. The court held that this was not a compliance with the statute, saying: "So far from subscribing their names to the will, it may be said with much more propriety and accuracy of speech that they merely indorsed the paper enveloping and inclosing the will, without any accompanying writing or memorandum to indicate the purpose of the indorsement, or showing any connection whatever between the indorsement and the will." In Roy v. Roy's Ex'r, 16 Grat. (Va.) 418, 84 Am. Dec. 696, the sheet of paper upon which the will was written was folded in the form of a letter, and the words, "David M. Roy's Will," were indorsed upon the back in the handwriting of the deceased at about the middle of the third page when the paper was unfolded. His name was not signed at the end of the writing. The court held that it was not entitled to probate, saying: "It is an unusual mode of signing or authenticating a paper as a concluded act by indorsing the name of the person executing it on the back. Such indorsement is usually made as a label or mark to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function in this case." The same rule was followed in Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Patterson v. Ransom, 55 Ind. 402.

Whether the deceased intended to execute his will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. Parol evidence cannot be admitted to show that the testator intended the space signed by him to be the end of the will, if, upon an inspection of the instrument, it appears that it is not in fact at the end. Evidence will not be received for the purpose of showing that he intended to comply with the requirements of the statute if it appears upon the face of the instrument that he had not in fact so complied. It must appear upon the face of the will itself that its

physical execution is in accordance with these requirements. Matter of Hewitt's Will, 91 N. Y. 261; Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Patterson v. Ransom, 55 Ind. 402.

Under these considerations, it must be held that the testator did not comply with the requirements of the statute in the execution of his will, and the judgment of the superior court is therefore affirmed.[16]

In re SWIRE'S ESTATE.

Appeal of McGINLEY.

(Supreme Court of Pennsylvania, 1909. 225 Pa. 188, 73 Atl. 1110.)

From a decree refusing an issue devisavit vel non in estate of Hetty W. Swire, deceased, Samuel T. McGinley appeals.

The case turned upon whether the testatrix had signed the codicil to her will at the end thereof.

The codicil was as follows:

Second Codicil to Will.

"I, Hetty Wharton Swire, do hereby make and publish this Second Codicil to my last will and testament as follows:

"1. I give and bequeath unto Lily McGinley my seal skin coat.

"2. I give and bequeath unto Edna Pennock my black and white check silk dress.

"3. I give and bequeath unto Mrs. William McGinley (Fortieth Street) my cut glass ware.

"4. I give and bequeath unto Lizzie Gibbs my cloth coat.

"5. I give and bequeath unto James P. Cairns the large pictures of my husband, David Owen Swire, and myself.

"6. I give and bequeath unto Lewis E. Herring the ornaments on the mantel in the parlor of my residence No. 5000 Walton Avenue, Philadelphia.

"7. I give and bequeath unto the Misses Bradley and to Mrs. Clara Mitchell, my other dresses.

"8. I give and bequeath unto my Cousin Benjamin Bradley my Knit Slumber Robe.

"In Witness Whereof I have hereunto set my hand and seal this Twentieth day of April, A. D. One thousand nine hundred and six (1906).

"Hetty W. Swire. [Seal]

"Signed, sealed, published and declared by the above named Hetty W. Swire as and for a Second Codicil to her last will and testament in the presence of us who at her request in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

Edna Pennock,
"Alfred Moore."

"9. I give and bequeath a Dining Room Table Cover unto my Niece Anna Austin.

"10. I give and bequeath the Family Bible to my Nephew William J. McGinley (The McGinley Bible).

"11. I give and bequeath the Swire Bible to James P. Cairns.

"12. I give and bequeath all the rest residue and remainder of my estate unto my nieces and nephews and the nieces and nephews of my deceased husband David Owen Swire share and share alike.

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16 See Sears v. Sears, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353 (1907); In re Gibson's Will, 128 App. Div. 769, 113 N. Y. Supp. 266 (1908). But see David S. Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478 (1885); Morrow's Estate, 204 Pa. 479, 54 Atl. 313 (1903). "Thus the general principle

MITCHELL, C. J. The statute requires that a will shall be in writing, and signed by the testator "at the end thereof." The end meant by this provision is the logical end of the language used, which shows that the testamentary purpose has been fully expressed. The position of the signature with regard to the bottom or end of the page is only evidence on the question whether the testator has completed the expression of his intention. Prima facie that is the natural place for the signature to be placed to show the full expression of the testator's wishes and therefore is presumptively the right place for it, but it is only evidence and must give way to evidence of a different intent.

In Hays v. Harden, 6 Pa. 409, Chief Justice Gibson says: "Signing at the end of a will was required by the statute to prevent the evasion of its provisions that followed the English statute of frauds, which the judges held to be satisfied wherever the testator's name, in his own handwriting, was found in the introductory or any other part of the instrument." In Heise v. Heise, 31 Pa. 246, Strong, J., says: "Nor should we lose sight of the mischiefs which existed at the time when it [the statute] was enacted, mischiefs which it was designed to remedy. Among these, none was more serious than the facility with which unfinished papers, mere inchoate expressions of intention, were admitted to probate as valid wills of decedents. Letters, memoranda, mere notes unsigned, which were entirely consistent with a half formed purpose, and which may have been thrown aside, and never intended to be operative, were rescued from their abandonment, proven as wills, and allowed to prevail as dispositions of property which there was much reason to believe the decedent never in-

has been clearly established that a will is to be read in such order of pages or paragraphs as the testator manifestly intended, and the coherence and adaptation of the parts clearly require. In writing a will upon the pages of foolscap paper, a testator may or may not conform to the order of the consecutive pages of the folio; there is no law which binds him in this respect; he may begin upon the fourth page of the folio and conclude upon the first, or he may commence upon the first, continue upon the third, and conclude upon the second; in whatever order of pages it may be written, however, it is to be read, as in Wikoff's Appeal, 3 Harris [15 Pa.] 281 [53 Am. Dec. 597], according to their internal sense, their coherence or adaptation of parts. The order of connection, however, must manifestly appear upon the face of the will; it cannot be established by extrinsic proof. Whilst, therefore, the end of the writing in point of space may in most cases be taken as the end of the disposition, it does not follow that in all cases the signature must, of necessity, be there written, if it be written at the end of the will, according to such connection and arrangement of the pages or sheets, as the obviously inherent sense of the instrument requires." Clark, J., in David S. Baker's Appeal, 107 Pa. 381, 392, 52 Am. Rep. 478 (1885). In Mader v. Apple, 80 Ohio St. 691, 89 N. E. 37, 23 L. R. A. (N. S.) 515 (1909) there was a blank space amounting to 23½ inches between the end of the dispositive portions of the will on page 2 and the testimonium clause and signature of the testatrix near the bottom of page 3, and yet it was held that the will was signed at the end. Where a testatrix signed in the attestation clause, the will was held to have been signed at the end. In re De Hart's Will (Sur.) 122 N. Y. Supp. 220 (1910). On signing at the end of the will, see 2 Am. & Eng. Ann. Cas. 730, note; 11 Am. & Eng. Ann. Cas. 1013, note; 17 L. R. A. (N. S.) 353, note; 23 L. R. A. (N. S.) 515, note.

tended. It was to remedy this mischief that the act of 1833 provided that every will should be signed at the 'end thereof'; that thus, by his signature in that place, the testator should show that his testamentary purpose was consummated, and that the instrument was complete." And in Knox's Estate, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, it was said: "The purposes of the act of 1833 were accuracy in the transmission of the testator's wishes, the authentication of the instrument transmitting them, the identification of the testator, and certainty as to his completed testamentary purpose. The first was attained by requiring writing instead of mere memory of witnesses, the second and third by the signature of testator, and the last by placing the signature at the end of the instrument. The first two requirements were derived from the English statute. The third was new (since followed by the act of 1 Vict. c. 26), and was the result of experience of the dangers of having mere memoranda or incomplete directions taken for the expression of final intention. Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478; Vernon v. Kirk, 30 Pa. 218."

In the present case the connected sense of the text is entirely clear, though it does not follow the usual order of arrangement. But it does not deviate from it more than many letters written in the style of the present day where the writing jumps from the first to the third page and then back to the second. The full substance of the testatrix's intent and its expression are there, and the signature is at what she intended and regarded as the end of her will. Where that is manifest, the continuity of sense and not the mere position on the page must determine the statutory "end thereof" as the place for the signature. The unusual, and as it might be called irregular, arrangement of the several parts of the will is not so great as in Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597. There is no Pennsylvania case which conflicts with this view, though care must be taken to distinguish cases like Hays v. Harden, 6 Pa. 409, where an addition after the signature was held to be testamentary and therefore to invalidate the will; Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597, where the converse was held that a mere memorandum not testamentary in character did not have that effect; Heise v. Heise, 31 Pa. 246, where a testamentary clause after the signature but not signed, and shown not to have been on the will when the latter was executed, was held not to affect its validity. This was however, a fully executed will and plainly within the protection of the clause of the statute that no will shall be repealed otherwise than by some other will or codicil duly executed and proved, or by burning, cancelling, obliterating, or destroying the same, by the testator or by some one in his presence and by his express directions.

We are not unmindful of possible danger in allowing marginal writing to be counted as part of the text of the will. Certainly parol testimony to that effect where there is no reference in the will to identify and incorporate it must be received with caution. But to some extent

parol testimony must always be admissible, as to prove signatures, show identity, etc. The exact point at which it must stop cannot be laid down in any hard and fast terms, but must depend on the necessity of the case. It will be observed that in Wikoff's Appeal, 15 Pa. 281, 53 Am. Rep. 597, and Heise v. Heise, 31 Pa. 246, the testimony was admitted apparently without objection. In the present case the question is purely theoretical as the good faith of the entire transaction is admitted. Decree affirmed.[17]

FOSSELMAN v. ELDER.

(Supreme Court of Pennsylvania, 1881. 98 Pa. 159.)

See post, p. 204, for a report of the case.

In re GOODS OF MADDEN.

(Irish High Court of Justice, King's Bench Division. [1905] 2 Ir. 612.)

Application that the will of Helen A. Madden be admitted to probate.

ANDREWS, J.[18] After a careful consideration of the evidence which has been adduced, and a close inspection and examination which I have made of the four sheets of paper which are presented as comprising the will of the late Mrs. Helen Annie Madden, I have felt myself at liberty to come as I do to the conclusion that what she wrote on those sheets was all written at the same time, and that the sheet now pinned in front was written last, and that when it was signed the four sheets were all together in the same place (see Jarman on Wills [4th Ed.] p. 84; Bond v. Seawell, 3 Burr. 1775). The character of all the paper is the same. The handwriting is the same, and is all uniform, and it appears to have been all written with the same ink. The four sheets were manifestly written to constitute a will, and if the sheet now pinned in front be placed at the end, the four sheets will read consecutively as constituting a perfectly formal will, ready for execution. The internal evidence which the will affords shows that the person who purports to be the writer of it was Mrs. Helen A. Madden, and it is proved to be all in her handwriting by the affidavit of Mr. Richard Owen Armstrong.

[17] But see Irwin v. Jacques, 71 Ohio St. 395, 73 N. E. 683, 69 L. R. A. 422 (1905), where the testator intended a clause written on the margin to be a part of the will, and indeed, declined to sign until it was put there, and yet, as there was in the will no reference "by word or character" to the marginal clause, the will was held not to be signed at the end.

[18] The statement of facts is omitted, and part only of the opinion is given.

I have also come to the conclusion that when the four sheets were written they were separate and unconnected. It will be observed that the writing on the sheet now pinned in front begins with a formal attestation clause, commencing with the words, "Signed by me, the said Helen A. Madden," which assists the conclusion I have come to, that this sheet was written last. I would be quite unable to come to the conclusion that when writing out what she manifestly intended to constitute her will she began with this attestation clause, which I regard as referring to what she had already written. A will may consist of several separate unconnected sheets of paper.[19] It is not disputed that if the sheet now pinned in front was the last sheet the will

[19] "It is well established that a will may be made up of separate sheets of paper, and they need not be fastened together. Wikoff's App. 15 Pa. 291, 53 Am. Dec. 597; Barnewall v. Murrell, 108 Ala. 366, 18 South. 831; Ela v. Edwards, 16 Gray (Mass.) 91; Harp v. Parr, 168 Ill. 459, 48 N. E. 113." Deemer, J., in Schillinger v. Bawek, 135 Iowa, 131, 138, 112 N. W. 210, 213 (1907). See, also, Woodruff v. Hundley, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145 (1900); Matter of Snell, 32 Misc. Rep. (N. Y.) 611, 67 N. Y. Supp. 581 (1900); Matter of Fitzgerald, 33 Misc. Rep. 325, 68 N. Y. Supp. 632 (1900). Yet Bargrove Deane, J., has stated in Lewis v. Lewis, L. R. [1908] P. 1, 5, that all the sheets must be attached in some way at the time of attestation.

In Palmer v. Owen, 229 Ill. 115, 117, 82 N. E. 275, 276 (1907), the court said: "Counsel for appellant say the sheets upon which the will was written were not all uniform in texture and finish, and from this circumstance, and the further fact that the witnesses to the will were unable to identify every sheet of it as being the same paper the testator signed and they witnessed as his will, it is contended probate should have been denied, because they say the proof does not show that the instrument sought to be probated is the whole instrument acknowledged and executed by the testator as his will. It is true, as counsel contend, that it is possible, where a will is written on separate sheets of paper, loosely fastened together, that one or more sheets might be removed and others substituted but the possibility of this being done is not sufficient to justify denying the admission of a will to probate. It is not necessary to the validity of a will that it should be all written on one sheet of paper. All that is required is that the whole will shall be in the presence of the witnesses when attested by them. Harp v. Parr, 168 Ill. 459, 48 N. E. 113. Neither is it required that the witnesses to a will should read it or examine it with such care as to be able, upon an application to admit it to probate, to say that all the pages or clauses of the proposed will were the pages and clauses signed by the testator and attested by them. It is not required that the subscribing witnesses shall know that the instrument is a will. Webster v. Yorty, 194 Ill. 408, 62 N. E. 907. The proof shows the testator declared to the witnesses that the paper was his will; that he signed it in their presence, and at his request and in his presence they each attached their signatures to it as witnesses. This was a compliance with the requirements of the law and entitled the will to be admitted to probate, in the absence of proof of 'fraud, compulsion or other improper conduct,' in the execution of the will. No such proof was made in this case, and without adverting further to the testimony it is sufficient to say that we have read it all, and there is no evidence in this record that would have justified the court in denying admission of the will to probate."

That all the sheets must be present at the time of attestation, see also Gass' Heirs v. Gass' Executors, 3 Humph. (Tenn.) 278 (1842). That the attestation by the witnesses must be on the same sheet of paper as that which contains the signature of the testator, or on some paper physically connected with that sheet, see In re Baldwin's Will, 146 N. C. 25, 59 S. E. 163, 125 Am. St. Rep. 466 (1907).

On wills on separate sheets of paper, see 13 Prob. Rep. Ann. 499, note.

was duly executed pursuant to the Wills Act, 1 Vict. c. 26, as amended by the Act, 15 Vict. c. 24; and as I hold that the sheet now pinned in front was the last sheet written, and therefore was, when written, at the end of the will, it would not, in my opinion, have ceased to be at the end of the will by having been misplaced, assuming that it was pinned in front at the time it was signed. Even if, therefore, it was pinned in front when signed, such misplacement of it would not have prevented it from continuing to be in fact the last sheet, and the execution of the will under those circumstances would have been valid. But there is no proof that this sheet was so misplaced when signed.

It may have been signed before the sheets were pinned together, and there are also evidences that their present attachment by the pin which now connects them was not always the same.

One of the witnesses (the present Archbishop of Dublin) who attested the deceased's signature has made an affidavit in which he states that he knew it was necessary to sign a will at the foot or end, and that he would not have knowingly attested a will signed at the beginning; and the other witness to the deceased's signature (Mr. Greenwood Pim) has made an affidavit in which he states that he knew a will must be signed at the end, and would not knowingly attest a will on its first page; even in the absence, therefore, of authorities, I would hold that this will was duly executed; but (amongst others) the case of Gregory v. Her Majesty's Proctor, 4 Notes of Cases, 620 (which recognizes it as decided that all the papers of which a will consists need not be connected together), the case of The Goods of Wotton, 3 P. & D. 159, which in some respects is similar to the present case, and the case of The Goods of Jones, 4 Swa. & Tr. 1, cited with approval in The Goods of Rice, I. R. 5 Eq. 176, in my opinion, support the conclusions I have come to.[20] * * *

In re GOODS OF BIRT.

(Court of Probate, 1871. L. R. 2 P. & D. 214.)

Charles Birt's will occupied the first side of a half sheet of paper entirely, and was executed at the bottom of the first side. In the will was a gift of four cottages to his wife Elizabeth Birt, for life, and an incomplete sentence marked by an asterisk and the words: "*See over. C. B." At the top of the second side of the half sheet of paper was

[20] The court then declared the will duly executed, and directed that the will should be so set forth in the grant of letters "that what is written on the sheet of paper now pinned in front thereof shall be set forth as at the end of the said will."

In a recent case the second and fourth pages of a will of five sheets were interchanged, the pages being pinned together when offered for probate, but having been separate when the will was executed, and the will was held properly probated. Sellards v. Kirby (Kan.) 108 Pac. 73 (1910).

another asterisk and the words: "See over.* C. B."—and a gift of the cottages at the wife's decease to testator's daughter. This clause on the second side of the sheet was not seen by the witnesses when they executed the will, but it was proved to have been written before the execution.

A motion was made for administration with the will annexed, including the words written on the back of the will. The heir at law consented to the grant.[21]

LORD PENZANCE. As the heir at law, the only person interested in excluding the words, consents, I can have no hesitation in making the grant. It seems to be the better course to look upon these words as an interlineation, for the clause without them would be unmeaning. The testator, at the end of the unfinished sentence, has put a mark (*), and under a corresponding mark completes the sentence, and he did this before the will was executed. He clearly intended that the words should be introduced where he made the first mark. By 15 Vict. c. 24, § 1, it is enacted that no signature, under the acts, shall be operative to give effect to any disposition or direction which is underneath. or which follows it; but I think that these words, although, as written, they follow the signature, must be read in the place in which the testator intended they should be read, and therefore preceding the signature.[22]

In re GOODS OF MALEN.

(High Court of Justice, Probate Division, 1885. 54 L. J. Prob. 91).

William Malen died at Barkingside, Essex, on the 9th of April, 1885, having on the 21st of November, 1882, executed a will upon a printed form.

The testator handed written instructions for a will to Harriett Emily Edwards, who resided in the same house, and requested her to copy them upon the printed form, which was comprised in one side of a sheet of paper, and included an attestation clause at the foot.

The said H. E. Edwards did as the testator requested; but was unable to include the whole will on one page, and she therefore wrote the concluding words of the will at the top of the second page of the sheet. The first page ended in the middle of a sentence, which was completed on the second page.

By the will the testator appointed his son-in-law, Samuel Wright, sole executor. The will was duly attested, the signatures of the testator and the two witnesses being written below the attestation clause

[21] The statement of facts is rewritten.

[22] See David S. Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478 (1885). But see Matter of Whitney, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616 (1897), and cases there cited. Compare In re Schlegel's Will, 62 Misc. Rep. 439, 116 N. Y. Supp. 1038 (1909).

at the foot of the first page, but there were no signatures or initials below the words on the second page.

C. A. Middleton moved for probate of the whole instrument. Although 15 Vict. c. 24, § 1, provides that no signature under that act or the Wills Act, 1837, "shall be operative to give effect to any disposition or direction which is underneath or which follows it," words on the second page of a will which is duly signed at the foot of the first page have been included in the probate as interlineations where the court has been satisfied that they were written before execution.

BUTT, J. In In re Goods of Birt, L. R. 2 P. & D. 214, the asterisk and the words "see over" preceded the testator's signature, whereas here there is nothing to connect the signature with the words on the second page. In the present case the "disposition" is partly before and partly after the signature, and therefore the proper course will be to exclude the words on the second page. and to grant probate of the first page only.[23]

SECTION 4.—TESTATOR'S ACKNOWLEDGMENT, PUBLICATION, AND REQUEST TO WITNESSES TO SIGN

WHITE v. TRUSTEES OF BRITISH MUSEUM.

(Court of Common Pleas, 1829. 6 Bing. 310.)

TINDAL, C. J.[24] * * * The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by W. White [the testator, who died May 13, 1823] in their [the witnesses'] presence; but that with respect to two of the witnesses, Hounslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued, that if such subscription of their names satisfies the intention of the statute the word "attested" will have no force whatever, and may be considered as if it had never been inserted.

[23] See Millward v. Buswell, 20 Times Law Reports, 714 (1904), where it was held that the first page of a will, written on three pages of paper and signed by testatrix and her witnesses on the first page only, ought to be admitted to probate without the other pages. For similar holdings see Royle v. Harris, [1895] P. 163; In the Goods of Rebecca Susan Gilbert, 78 Law Times (New Series) 762 (1898); In the Goods of William Gee, 78 Law Times (New Series) 843 (1898); In the Goods of Anstee, [1893] P. 283.

"But it is entirely clear that the first and second pages of the paper, without the third, did not constitute the last will of the decedent. The paper was not signed at 'the end thereof' as required by the statute to make a valid will." Day, C. J., in Glancy v. Glancy, 17 Ohio St. 134, 139 (1866).

[24] The statement of facts is omitted, and part only of the opinion is given.

The question, however, appears to us to be, Whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in words, yet an acknowledgment in fact, by the devisor to the subscribing witnesses, that this instrument was his will? for if by what the devisor has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of Ellis v. Smith [1 Ves. Jr. 11 (1754)]. * * *

When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were res integra, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and we do therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the statute. Judgment for defendants.

In re CLAFLIN'S WILL.

(Supreme Court of Vermont. Orange, 1902. 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261.)

ROWELL, C. J.[25] * * * A more important question arises on the charge where it says that the attesting witnesses must have been informed and have known that it was Claflin's will that they were then and there asked to witness and attest; that, if he concealed from them the fact that it was his will, they did not attest his will; that it was necessary when they signed the will as witnesses that they should know they were signing as witnesses to his will; that they must have been informed of that in some way, and have understood it when they signed.

It appears that the will, including the attestation clause, was written and signed by the testator; that he superintended its execution,

[25] Part only of the opinion is given.

and that the attesting witnesses subscribed it at his request and in his presence; but whether in the presence of one another was the important question.

Under statutes like ours, which provide that wills must be "attested and subscribed by three or more credible witnesses in the presence of the testator and of each other," it is very generally held in this country that the witnesses need not know that the instrument they are attesting is a will, because such statutes are construed not to require it; and it is a question of construction, and nothing more.

The English statute of frauds (29 Car. II, c. 3, § 5), before its modification by 1 Vict. c. 26, § 9, required wills of lands and tenements to be "attested and subscribed" in the presence of the testator by three or four credible witnesses; and it was always held in England under that statute that the witnesses need not know that the instrument was a will.

In White v. Trustees of the British Museum, 6 Bing. 310, only one of the witnesses knew the nature of the instrument; and it was argued that, if such a subscription of their names satisfied the statute, the word "attested" would have no force whatever, and might as well have been omitted. But the court said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will; for if, it said, by what the testator did he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, the attestation thereof must be considered as complete, within the principle and authority of Ellis v. Smith, 1 Ves. Jr. 11, decided in 1754. And it appearing that the testator knew the instrument to be his will, as it was written and signed by him; that he produced it to the three persons, and asked them to sign it, intending they should sign it as witnesses; that they subscribed their names thereto in his presence, and returned the same identical paper to him,—it was held that he acknowledged in fact to the witnesses, though not in words, that the instrument was his will, and that its execution was good under the statute; for, the court said, whatever might have been the doubt as to the true construction of the statute, the law was then fully settled that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, nor means of knowledge, either of the nature of the instrument or the testator's object in signing it; and that the facts of that case placed the testator and the witnesses in the same relation as though an oral acknowledgment of his signature had been made.

The same thing is held in Wright v. Wright, 7 Bing. 457. In Trimmer v. Jackson, 4 Burn, Ecc. Law (3d Ed.) 102, a will was estab-

lished where the testator purposely misled the witnesses into supposing that it was a deed.

In Massachusetts they hold as they do in England, under a statute like ours in this respect. Thus, in Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155, the testator signed the instrument in the presence of two of the witnesses, and pointed out his signature to the third witness, and each of the witnesses signed the instrument as a witness in the presence of the testator and at his request; but the testator did not disclose to any of the witnesses that it was his will, nor did any of them know or suspect the nature of the instrument, and yet it was held well executed. The court said that calling on the witnesses to attest his execution of an instrument, the character and contents of which he well knew, was, in effect, a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character of the instrument was not disclosed to them; that it was as if the testator had said: "This instrument is my act. It expresses my wish and purpose, and, though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence;" that the legislature had prescribed certain solemnities to be observed in the execution of a will that it may be seen that it is the free, conscious, intelligent, act of the maker, but that it had not prescribed that he should publish to the world nor to the witnesses what is in the will, nor even that it is a will.

Connecticut holds the same way, where the statute requires a will to be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other. Appeal of Canada, 47 Conn. 450. It is there said that the primary reason for requiring the presence of the witness is that he should be able to say that the testator put his name upon the identical piece of paper upon which he put his own; that the witness identifies the paper by the conjunction of the two signatures, not by the character of its contents. Allen v. Griffin, 69 Wis. 529, 35 N. W. 21, is to the same effect.

In Re Hulse's Will, 52 Iowa, 662, 3 N. W. 734, the same is held. There the statute requires a will to be witnessed by two competent witnesses. The court said that to witness means "to see the execution of an instrument, and to subscribe it for the purpose of establishing its authenticity," and referred to the English statute of frauds as containing a similar provision, and said it had been construed as not requiring publication in the sense of acquainting the witnesses with the nature of the instrument.

In Watson v. Pipes, 32 Miss. 451, the same is held under a statute taken from 29 Car. II. The court said that such seemed to be the holding in all the states in which the provisions of the English statute in regard to wills have been adopted; that the rule is based upon

the plain and obvious construction of the statute, which it did not hesitate to adopt.

The Alabama Code requires wills to be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator." The predecessor of this statute was borrowed from 29 Car. II, c. 3, § 5. In Barnewall v. Murrell, 108 Ala. 366, 18 South. 831, the court said that, as the statute did not require the testator to inform the attesting witnesses that the instrument was his will, it was immaterial to the due execution of the will in that case whether the testatrix made any declaration to the attesting witnesses, or gave them any notice or information, that the instrument was her will.

In Schouler, Wills (3d Ed.) § 326, it is said to be the long-established doctrine, both of England and the United States, that, independently of an express statute requiring publication, a will may be duly executed without any formal announcement by the testator of a testamentary purpose, and without anything being said by him to show the nature of the instrument the witnesses are called upon to subscribe; that the maker's signature animo testandi, and his proper acknowledgment, showing that he has put his name bona fide upon the paper that he desires witnessed, when he has not signed in their presence, renders the execution valid in general, without any other or more formal execution; and that the signature of the witnesses being duly affixed, the act of execution becomes complete.

In Missouri, under a statute that is almost an exact transcript of 29 Car. II, c. 3, § 5, they hold that there must be some declaration by the testator that the paper is his will; but that it need not be verbal,—that an act or a sign is enough; but that the witnesses must know it is the will of the testator, and witness it at his request. Odenwaelder v. Schorr, 8 Mo. App. 458. In support of this construction of the statute, Mundy v. Mundy, 15 N. J. Eq. 290, is referred to. But that case was decided under a statute that expressly required that the instrument should be "declared to be" the last will and testament of the testator; so no authority for the holding.

The contestants rely much upon Swift v. Wiley, 1 B. Mon. (Ky.) 114, where it is said that to attest the publication of a paper as a will, and to subscribe thereto the names of the witnesses, are very different things, and required for different ends; that attestation is an act of the mind, subscription an act of the hand; that to attest a will is to know that it is published as such, but to subscribe it is only to write on the paper the names of the witnesses for the sole purpose of identification. But this case is of little worth, for Flood v. Pragoff, 79 Ky. 607, expressly decides that it is not necessary that the witnesses should know the nature of the instrument, and says that the question never before arose in that state; and it hardly could have arisen in Swift v. Wiley, for there was a publication there by the testator, at which the witnesses were present. It is said in Flood v. Pragoff

that the Legislature had prescribed such formalities for the execution of wills as it thought proper, and that the court ought not to add to them by construction, especially when the efficacy of the constructive requirement depended solely upon the memory of the subscribing witnesses.

Illinois and Wisconsin repudiate the idea that there is any difference between attesting and subscribing a will. Drury v. Connell, 177 Ill. 43, 52 N. E. 368; Sloan v. Sloan, 184 Ill. 579, 56 N. E. 952; Skinner v. Society, 92 Wis. 209, 65 N. W. 1037.

Dr. Lushington said in Bryan v. White, 2 Rob. Ecc. 315, that he felt no difficulty in answering the question, what is the meaning of "shall attest"? that attest means that the person shall be present and see what passes, and shall, when required, bear witness to the facts. Lord Chancellor Selborne said in Seal v. Claridge (1881) 50 Law J. 316, that: "Surely the very words 'ad testari' imply the presence of a witness standing by, who is not a party to the deed to be witnessed." Other English cases say that to attest an instrument is not merely to subscribe one's name to it as having been present at its execution, but includes also, essentially, the presence in fact at its execution of some disinterested person capable of giving evidence of what took place. Roberts v. Phillips (1855) 4 El. & Bl. 450; Ford v. Kettle (1882) 9 Q. B. Div. 139. Dr. Lushington somewhere illustrates that as a notary, by his attestation of protest, bears witness, not to the statements in the protest, but to the fact of making those statements, so the witnesses to a will bear witness to all the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence.

Judge Redfield, both in his work and his cases on Wills, strenuously contends that the witnesses must know the nature of the instrument; otherwise, he asks, what becomes of all that is said about the great solemnity the law attaches to the formal execution of wills, and how are the witnesses charged with the duty of seeing that the testator is of sound mind before they consent to attest the instrument, which, it is sometimes said, commits them to having attested that fact as well as the formal signature of the testator?

As to the "solemnity," the formal execution of wills being mere matter of statutory requirement, whatever has been said about it dehors the statute goes for nothing. As to the witnesses being charged with the duty of seeing that the testator is of sound mind, the statute does not thus charge them, unless by the word "attested"; and, if that word charges that duty, it must, it would seem, charge the further duty of seeing that he is of full age, for that is as essential under our statute as a sound mind. But the word "attested" does not charge the duty claimed, as is shown by Thornton's Ex'rs v. Thornton's Heirs, above cited. There it was contended that the weight to be given to the testimony of an attesting witness to a will

is matter of law, and that, therefore, the trial court was bound to charge, as requested, that such testimony is "entitled to much consideration on the question of capacity." But this court said that the law gives no weight to the testimony of such a witness beyond what it would be entitled to under the conditions that usually govern the value of testimony; that the prominence given to such testimony in opinions where both law and fact are discussed, arises from the witness' acknowledged opportunity for observation at the precise time in question, and from the probability of his having used the opportunity on account of his participation in the transaction; that it is because of his opportunity, not because he wrote his name on the instrument, that his testimony is usually listened to with attention; but that the law attaches no fictitious official weight to the testimony, so as to pass it for more than it is worth, but that its value is to be determined by the rules applicable to other testimony.

In Dean v. Dean's Heirs, 27 Vt. 746, it is said that attesting a will by the witnesses is an attestation of its publication; that a formal publication is not necessary; that writing and signing a will is sufficient publication; indeed, that any act of the testator's by which he designates that he means to give effect to the paper as his will, is a publication of the will itself. Nothing in this, except the words "as his will," indicates that the publication must be such as to inform the witnesses of the testamentary character of the instrument. And these evidently do not mean that, for it had just been said that writing and signing the will was a sufficient publication, and that suggests no such idea. They mean no more than is said in Roberts v. Welch, 46 Vt. 164, that a declaration by the testator to the witnesses that it is his will or his instrument is enough. Otherwise the court was running counter to the established construction of 29 Car. II, concerning which the court had a few years before said in Adams v. Field, 21 Vt. 266, that "when our statute of wills was enacted that statute of 29 Car. II had received a long-fixed and well-known construction; and when we adopt an English statute we take it with the construction that it has received, on the ground that this was the implied intention of the Legislature."

But it is proper to remark in this connection that what is said in Dean v. Dean's Heirs is entirely obiter, as the only question was whether the testimony warranted the finding that the will was executed by the testator in the presence of the witnesses, and subscribed by them in his presence and in the presence of each other.

In Roberts v. Welch, 46 Vt. 164, one of the witnesses did not know that the testator had signed the paper at all, nor what the paper was, nor for what purpose he himself was signing it. The court said that, although it was not necessary for the testator to sign in the presence of the witnesses, but that a declaration to the witnesses that it was his will or his instrument would be enough, yet that the witnesses must

know that by affixing their names to the instrument they were attesting its execution by the testator; that a person, to become an attesting witness, must be aware of the character of the act he is called upon to perform, and must subscribe his name animo testari. As nothing is said about the fact that the witness did not know the character of the instrument, it is manifest that the court did not regard it essential that he should know it, but only that he should know the character of his own act, and to that end should know that the testator had signed the paper. This gives force to the word "attested" in the statute, and makes it more than "subscribed"; makes it a mental act, but applies it in essentiality only to the execution of the instrument, not to a knowledge of its character.

But it is claimed that in this very case, when it was here before (73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693), we said the witnesses must know the character of the instrument. The language most relied upon in support of the claim is this: "Nor was it necessary to show by the attesting witnesses that at the time they signed they knew they were signing the testator's will. This fact, though necessary (Roberts v. Welch, 46 Vt. 164), may be shown by other witnesses, or it may be inferred from the circumstances." This language, when taken in connection with the case to which it refers and the context, does not mean, we think, what is claimed for it. The case referred to, as we have seen, does not require that the witnesses must know that the instrument is the testator's will, but only that it is his instrument, and that by affixing their names to it they are attesting its execution as such by the testator.

And when we look at the context we see that no more was meant, for therein the court had said that writing and signing the will and superintending its execution was a sufficient publication by the testator, and that in attesting it the witness attested its publication; and therewith agree the cases. But here is no intimation that the witnesses must know the character of the instrument. And the quotation from Ilott v. Genge, 3 Curt. Ecc. 181, is to the same effect, for, although it says that when a testator writes the will himself, and signs it, and produces it to the witnesses, and desires them to sign their names, that amounts to an acknowledgment on his part that the paper signed by them is his will; yet this is not saying that the witnesses thereby know it to be his will, but only that he himself knows it. That case arose under the statute of 1 Vict., under which it had always been held that, when the signature of the testator is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will.

We hold, therefore, that our statute does not require that the attesting witnesses to a will shall know the nature of the instrument.

It appeared that the witnesses were in the store of one of them when they signed, but it did not appear how large the room was, ex-

cept that it was a country general store. The jury asked if it was enough that the witnesses were in the same room. The court replied that merely being in the same room was not enough; the room might have been so large; that the witnesses must have been together in the presence of one another in such a way and in such a sense that they could see one another sign, whether they actually looked and saw or not; that they must have been right there where they could see one another sign. This is in substantial accord with Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62, and so no error. Reversed and remanded.[26]

In re MACKAY'S WILL.

(Court of Appeals of New York, 1888. 110 N. Y. 611, 18 N. E. 433, 1 L. R. A. 491, 6 Am. St. Rep. 409.)

EARL, J. The subscribing witnesses came to the dwelling-house of the deceased by previous appointment, and, while seated at his writing-desk, he said to them: "Gentlemen, what I sent for you for was to sign my last will and testament." Thereupon he took from his writing-desk the instrument offered for probate, and, laying it before the witnesses, said: "It is now all ready, awaiting your signatures." He then presented the instrument to the witness McCarrier for his signature, and he signed it, saying, as he did so, "I am glad, Father Mackay, you are making your will at this time; I don't suppose it will shorten your life any," to which he replied, "Yes, he wanted it done, and off his mind;" and then the witness Mulligan, who had joined in this conversation, signed the instrument, as a witness. At the time of exhibiting the instrument to the subscribing witnesses he told them it was his will; but he handed it to them so folded that they could see no part of the writing except the attestation clause, and they did not see either his signature or seal.

[26] See Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536 (1901). Under some state statutes it is required that the testator declare to the witnesses that the instrument they are asked to witness is his will. See 3 Am. Prob. Rep. 247, note. In New York, where such is the case, the fact that the will is in the handwriting of the testator may be important. "The fact that the entire will was in the handwriting of the testator is also a most significant and convincing fact, especially as bearing on the question as to whether the testator declared the instrument to be his will. In considering the object of requiring this declaration, the Court of Appeals has said: 'That purpose is to make sure that the testator is aware that he is making a will, and that he be not imposed on and procured to sign a will when he supposes it to be some other instrument. The witnesses' knowing it to be a will is of no moment, except as to their being then and there in his presence or by him told so, makes it certain that he knew it to be such an instrument.' Trustees v. Calhoun, 25 N. Y. 422–425. It is, therefore, impossible for a testator to be deceived or imposed upon as to the character of the instrument he is executing, when he has himself written it, and in addition declared it to be his last will and testament." Marcus, S., in Matter of Moore, 46 Misc. Rep. 537, 540, 541, 93 N. Y. Supp. 61, 64 (1905).

There would undoubtedly have been a formal execution of the will in compliance with the statutes, if the witnesses had at the time seen the signature of the testator to the will. Subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it. And so it has been held in this court. In Lewis v. Lewis, 11 N. Y. 221, where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names to it it was so folded that they could not see whether it was signed by him or not, and the only acknowledgment or declaration made by him to them, or in their presence, as to the instrument, was, "I declare the within to be my will and deed," it was held that this was not a sufficient acknowledgment of his subscription to the witnesses within the statute. In that case Allen, J., writing the opinion, said: "A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may or may not be at the time subscribed." In Mitchell v. Mitchell, 16 Hun, 97, affirmed in this court in 77 N. Y. 596, the deceased came into a store where two persons were, and produced a paper, and said: "I have a paper which I want you to sign." One of the persons took the paper, and saw what it was and the signature of the deceased. The testator then said: "This is my will; I want you to witness it." Both of the persons thereupon signed the paper as witnesses, under the attestation clause. The deceased then took the paper, and said: "I declare this to be my last will and testament," and delivered it to one of the witnesses for safe-keeping. At the time when this took place the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed, for the reason that one of the witnesses did not see the testator's signature, and as to that witness there was not a sufficient acknowledgment of the signature or a proper attestation.

It is true that in Willis v. Mott, 36 N. Y. 486, 491, Davies, C. J., writing the opinion of the court, said that "the statute does not require that the testator shall exhibit his subscription to the will at the time he makes the acknowledgment. It would therefore follow that when the subscription is acknowledged to an attesting witness it is not essential that the signature be exhibited to the witness." This is a mere dictum, unnecessary to the decision in that case, and therefore cannot have weight as authority. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature. Otherwise imposition might be possible, and sometimes the purpose of the statute might be frustrated.

We think, therefore, that probate of the will was properly refused, and that the judgment below should be affirmed, without costs. All concur.[27]

In re KARRER'S WILL.

(Surrogate's Court, Kings County, 1909. 63 Misc. Rep. 174, 118 N. Y. Supp. 427.)

In the matter of the last will of Margaret Karrer, deceased. Proceeding for probate of will. Probate decreed.

KETCHAM, S.[28] The paper offered for probate was signed by the testatrix and by the witnesses with such copious disregard of the statutory requirements that its invalidity would have to be confessed, were it not that, immediately thereafter and upon a separate occasion, the witnesses were brought into the presence of the testatrix, and the testatrix acknowledged her subscription thereto in the presence of each of the attesting witnesses, declared the instrument to be her last will and testament, and requested the witnesses to attest her act; and the witnesses, with the knowledge of the testatrix, reaffirmed their previous signatures without further writing. Upon this second at-

[27] See In re Goods of Mary Gunstan, L. R. 7 P. D. 102. "The question has sometimes arisen whether, under a local statute or code, the requirement is that the testator acknowledge the signature to the will to be his act and deed, or that he acknowledge the will to be his act and deed. In England, the statute of 1 Vict. upon the subject requires the signature of the testator to be made or acknowledged. 1 Jarm. Wills, marg. pp. 83, 84. In New York, and perhaps in some of the other states, the statute requires that there must be an acknowledgment of the signature. Schouler, Wills (2d Ed.) § 325. Decisions based upon these statutes have held, in substance, that there is not a sufficient acknowledgment of the signature by the testator when he produces a will, and requests the witnesses to sign it, unless his signature is visibly apparent on the face of the paper, and is seen, or can be seen by the witnesses, especially if he does not explain the instrument to them. Schouler, Wills (2d Ed.) §§ 321-325; 1 Williams, Ex'rs, marg. p. 88; 1 Jarm. Wills (Bigelow's 6th Ed.) marg. p. 84. But we are inclined to think that these decisions are not applicable where the statute, as is the case with that in this state, merely requires that the testator acknowledge the will or codicil to be his act and deed, and does not specifically and in terms require the signature to be acknowledged. A man may acknowledge an entire written instrument to be his act and deed, without necessarily calling the attention of those before whom he produces it to any particular part of such instrument. But, if he is required to make acknowledgment of a specified part of it, it may be requisite that attention should be directed to that part." Magruder, J., in Hobart v. Hobart, 154 Ill. 610, 616, 39 N. E. 581, 583, 45 Am. St. Rep. 151 (1895). If the signature is visible, it is acknowledged, even though the testator merely asks the witnesses to subscribe as witnesses. Daintree v. Fasulo, 13 P. D. 67 (1888). This last case also holds that under the Wills Act, as under the Statute of Frauds, the witnesses need not be told nor know that they are witnessing a will. In Haynes v. Haynes, 33 Ohio St. 598, 31 Am. Rep. 579 (1878), it was held that under the Ohio statute a testator must acknowledge to the witnesses the signature made for him by another person in his presence and by his direction. On acknowledgment of signature in general, see 8 L. R. A. 824, note; 36 Am. Dec. 319, note.

[28] Part of the opinion is omitted.

tempt nothing was wanting to a complete transaction, unless it be that the witnesses did not then write their names anew.

There is no suspicion of unfairness, restraint, or mental incapacity, and the sole question is whether or not there was a fair compliance with the statute requiring that each witness "shall sign his name as a witness at the end of the will at the request of the testator." * * *

In Matter of Stewart's Will, 2 Redf. Sur. 77, the question arose whether there was a request to the witnesses before they signed. There was no express request. The court says: "I am further of the opinion that the reading of the attestation clause signed by the witnesses, stating that they subscribed by request of the testator in his presence, without objection from him, may be regarded as an adoption of a request to that effect, though subsequent to the signing by them. This view is not opposed to Jackson v. Jackson, 39 N. Y. 153."

Clearly the same rule by which a request, made after the subscription by the witnesses, may relate back to a moment before the actual subscription, will require that, under the same circumstances, the publication as well as the request may be regarded as having accompanied or preceded the signing by the witnesses.

In Jackson v. Jackson, 39 N. Y. 153, it was held that probate should be denied where the witnesses signed before the testator's act of signature; but in that case there were no words of publication, acknowledgment of the testator's signature, or request to the witnesses, after the testator had subscribed the instrument. Upon the facts there apparent the case determines nothing except that a will is not properly solemnized when the signatures of the witnesses, which were made at the request of the testator, but before his own subscription, are followed by his own subscription without any renewal of his publication or request. As appears from the language of the opinion quoted infra, the decision rests upon the absence of any publication or request after the paper was subscribed, as well as the lack of any proof that the witnesses by their signatures attested an act which had not been done when their names were written. The court says of the witnesses: "They are, in and by this act of signing their names, to attest, not only the signing or acknowledgment, but his cotemporaneous declaration that it is his will. Their signatures do not attest the signing by the testator, if they are placed there before the will is signed by him. For some period, longer or shorter, as the case may be, those signatures attest no execution—they certify what is not true. When, and in what moment, do they begin to operate as a compliance with the statute? The only reply that can be given is: When the testator signs his name. This is a dangerous construction of the statute. May the testator keep these signatures in his possession one hour, one week, or one year, and then add his signature? Certainly not, unless he summons the same persons to see him sign, or hear his acknowledgment thereof."

From the last sentence quoted, it is obvious that, in the personal opinion of the judge who wrote, the result would have been otherwise, if, after the signatures of the testator and the witnesses, there had been a further publication and request followed by the adoption of the witnesses' former signatures both by themselves and the testator.

The evidence in the case at bar does not permit a finding that these two attempts at will making constituted a single occasion, for there was a distinct break in the transaction between the original signing of the will and the final effort to cure the deficiencies which first existed; nor is the probate ended by the decisions that the acts prescribed by the statute of wills need not always be done in the order usually and properly observed. If the witnesses did not sign their names after the testatrix had signed and after her publication and request were made in their presence, then they did not ever sign as witnesses for the purposes of the statute, for the only request and the only attestation of which the circumstances permit, and in fact the only observance of any kind which took place in the presence of both witnesses, must have come to pass after the acknowledgment by the testatrix and her subscription formerly made.

The cases cited indicate that, where the signatures of the testator and of the witnesses all appear upon an instrument which has not yet been properly executed and attested, the witnesses may be said to have signed as such for the purposes of the statute if, as a new transaction, the testator acknowledges his signature, declares his will, and requests the witnesses to attest the same, and the witnesses thereupon, to the knowledge of the testator, accede to his request and adopt their previous signatures as an attestation of the transaction.

The law in its zeal for probate could not go much further, but authority justifies the admission of this will. It will be decreed accordingly. Probate decreed.†

MANNERS et al. v. MANNERS.

(Prerogative Court of New Jersey, 1907. 72 N. J. Eq. 854, 66 Atl. 583.)

MAGIE, Ordinary. The appeal is from a decree refusing probate to a paper writing offered as the last will and testament of Elizabeth V. Manners. The paper writing purported to be signed by the testatrix. There was a perfect attestation clause, to which was appended the signatures of two witnesses, and these witnesses were called and testified on the application for probate.

The perfect attestation clause appended to the will was prima facie evidence of due execution. The prima facie effect of such a clause, however, may be overcome by testimony, and even by the testimony of

† But see the cases on the order of signing, post, pp. 166–174.

the subscribing witnesses. Berdan's Case, 65 N. J. Eq. 681, 55 Atl. 728.

The questions presented are (1) whether their testimony overcomes the declaration of the attestation clause of the will as to publication by the testatrix; and (2) whether their testimony overcomes the attestation clause in respect to the signature of the will.

The evidence renders it clear that the signature was not made in the presence of the subscribing witnesses. When they entered the room in which the testatrix sat, they found there the scrivener who had drawn the will and who had requested them to come into the house to witness its execution. Thereupon the scrivener said that the testatrix had made her will and wanted them to witness it. The witnesses expressed the opinion that this was spoken in a voice loud enough to be heard by the testatrix, who sat some eight or ten feet distant in the same room, but they both declare that she made no sign of assent, and both agree that she did not sign the paper in their presence.

It is settled law that a testatrix may publish a will by assenting to a statement made in her presence. Such an assent may be made by some act or sign. If the scrivener declared, in the hearing of the testatrix, that the paper was her will and she had then signed it, publication might be inferred; but, when there was no act or sign by the testatrix, I think that the proof discloses that there was no publication by the testatrix.

As the paper writing was not signed in the presence of witnesses, it is by our statute invalid, unless the testatrix acknowledged "the making thereof"; i. e., the making of the signature in their presence. On this subject the evidence shows that the scrivener said, apparently with reference to the paper writing which was in the room and on the table, "This is her name." Testatrix remained silent, and no act or sign was made by her to that statement.

But, if she had signified her assent to the statement of the scrivener, in my judgment, the acknowledgment which the statute requires would not be made out. An acknowledgment that the signature was her name is not an acknowledgment that it was made by her, and I think nothing less than such an acknowledgment will satisfy the statutory requirements.

In my judgment the decree refusing probate must be affirmed.[29]

[29] "When there is no attestation clause, the proponent of the writing claimed to be a will must affirmatively prove all the statutory requisites, including that of publication, which is the declaration by the testator that the writing is his last will. Mundy v. Mundy, 15 N. J. Eq. (2 McCart.) 290; Swain v. Edmunds, 53 N. J. Eq. (8 Dick.) 142 [32 Atl. 369]; s. c., 54 N. J. Eq. (9 Dick.) 438 [37 Atl. 1117].

"Publication may be made by words, or acts, or signs, which clearly and distinctly make known to the witnesses that what they are requested to subscribe to is the testator's will. Robbins v. Robbins, 50 N. J. Eq. (5 Dick.) 742 [26 Atl. 673]; Swain v. Edmunds, ubi supra." Magie, Ordinary, in Vernon v. Vernon,

SECTION 5.—ATTESTATION IN THE PRESENCE OF THE TESTATOR AND, WHEN REQUIRED, IN THE PRESENCE OF THE OTHER WITNESS OR WITNESSES[30]

SHIRES v. GLASCOCK.

(Court of Common Pleas, 1687. 2 Salk. 688.)

Upon a feigned issue, the question was, Whether the will was made according to the Statute of Frauds? For the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them.

Et Per Cur. The Statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn.

DAVY & NICHOLS v. SMITH.

(Court of King's Bench, 1693. 3 Salk. 395.)

Upon a trial at bar, the question was, Whether the witnesses to a will had pursued the directions of the statute of frauds, etc., in subscribing their names? and it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so that he might see them subscribe their names if he would; and though there was no positive proof that he did see them subscribe yet that was a sufficient subscribing within the meaning of the Statute, because it was possible that the testator might see them subscribe; and therefore,

69 N. J. Eq. 759, 760, 761, 61 Atl. 409, 410 (1905). See In re Johnson's Estate, 152 Cal. 778, 93 Pac. 1015 (1908); Savage v. Bowen, 103 Va. 540, 49 S. E. 668 (1905); Burney v. Allen, 125 N. C. 314, 34 S. E. 500, 74 Am. St. Rep. 637 (1899).

[30] On the effect of the fact that the person who executed the will as testator was not previously known to the witness, see 21 L. R. A. (N. S.) 531, note. On the attestation and witnessing of wills, see, generally, 114 Am. St. Rep. 209, note.

PER CURIAM. If the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed are drawn close, it is a good subscribing within this Statute; because, if it is in his power to see them, and what is done, it shall be construed to be in his presence.

CASSON v. DADE.

(High Court of Chancery, 1781. 1 Bro. C. C. 99.)

Honora Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her. After having seen the execution, they returned into the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket.

The LORD CHANCELLOR [Lord THURLOW] inclined very strongly to think the will well executed, and the case of Shires v. Glascock, 2 Salk. 688 (1 Lord Raym. 507), 1 Eq. Abr. 403, was relied upon to that purpose.

Mr. Arden pressed much for an issue; but, finding LORD CHANCELLOR'S opinion very decisive against him, declined it.

In re BEGGANS' WILL.

(Prerogative Court of New Jersey, 1905. 68 N. J. Eq. 572, 59 Atl. 874.)

MAGIE, Ordinary.[81] * * * The attestation clause appended to the paper was not in the usual form. It reads thus: "We, the undersigned, witnessed Mrs. Ann Beggans sign this paper, which she declared and acknowledged to be her last will and testament. Michael B. Holmes. Peter F. Maguire." * * *

When an attestation clause states the performance of some of the requisite acts, but omits to state the performance of acts also requisite, on reason and authority the proponent must establish by evidence the performance of the latter acts. Ayres v. Ayres, 43 N. J. Eq. 565, 12 Atl. 621.

It will be observed that by the attestation clause now under consideration the subscribing witnesses assert the performance of two requisite acts thus: (1) That the deceased "declared" the disputed

[81] Part only of the opinion is given.

paper "to be her last will and testament," and (2) that they "witnessed" the deceased "sign this paper." They wholly omit to certify that they subscribed their names thereto in the presence of deceased. This requisite of the statute is designed to prevent substitution and fraud upon an intending testator (Mandeville v. Parker, 31 N. J. Eq. 242), and no amount of proof that the very paper signed by deceased was that which the subscribing witnesses signed will avail to establish it as a will if it fails to show that their signatures were affixed in the presence of the deceased. * * *

The third question is whether proponent's proof establishes the fact that the witnesses subscribed their names to the paper in the presence of deceased.

On this subject the attestation clause is silent, and the subscribing witnesses are again at variance. Both, however, agree that their act of subscribing was not done in the room in which deceased was, but in the adjoining room, at a table therein. They disagree as to the position of the table at that time, Maguire asserting that it was in the center of that room, and Holmes asserting that it was on one side of that room. It is conceded that if it was in the center deceased could not have seen the act of the witnesses in subscribing, while if it was on the side, as fixed by Holmes, the deceased could have seen the act if she had turned in that direction.

A diagram of the bedroom and of the adjoining room and the various pieces of furniture therein was put in evidence. It was made under the instruction of the daughter of the deceased, who is the principal beneficiary under the will. She placed the table at which Holmes said the witnesses signed in the position in which she says it was at the time. Assuming that the daughter correctly pointed out to the draftsman of the plan the respective positions of the furniture, it thereby appears that deceased, who was ill, was lying in a bed the head of which was against the partition between the bedroom and the adjoining room. The door between those rooms was a sliding door, and open. The table in the adjoining room was in such a position as to leave a possible vision to one lying on the bed for a width of three and one-half feet. But in order to see the act of the witnesses in subscribing the deceased would have been obliged not only to turn her head, but to look, as it were, above her head. If deceased was sitting up in the bed, she would have been obliged to turn her head over her shoulder in order to see the witnesses.

There is no satisfactory proof as to which position deceased was in when the signatures of the witnesses were made, and no proof at all that she turned her head, or placed herself in a position to see that act.

In Mandeville v. Parker, 31 N. J. Eq. 244, Chancellor Runyon declared that under our statute requiring the subscribing witnesses to a will to sign in the presence of the testator an attestation in the same room in which testator is is prima facie an attestation in his presence,

and, on the other hand, an attestation made in another room is prima facie not made in his presence. In Ayres v. Ayres, 43 N. J. Eq. 565, 12 Atl. 621, Chancellor McGill applied that doctrine to a case in which the witnesses' signatures were affixed in the same room, upon a bureau at the foot of the bed on which deceased was lying. Upon the proofs he found that deceased at the time was so supported that he could see the motions of the pen used by the witnesses, though he could not distinguish the letters the pen was forming, and that his eyes were open during the signing; and he held that the signing under those circumstances was a sufficient compliance with the statute.

If, in the case in hand, it had been made to appear that the deceased placed herself in a position to see the witnesses signing, and was looking in that direction, it may be that the presumption that the signing in the adjoining room was not a signing in her presence would have been overcome. But, in the absence of such proof, the presumption is not overcome. If Holmes is correct in his description of the place of signing by the witnesses, the signing is not shown to be a sufficient compliance with the statute. If Maguire is correct, the signing could not have been seen by deceased. The decree is therefore supported on this ground.[32] * * *

[32] See Goods of Colman, 3 Curt. 118 (1842); Norton v. Bazett, Deane & Swabey, 259 (1856). In Graham v. Graham, 32 N. C. 219 (1849), witnesses who signed in another room, where their backs could be seen by the testator if he turned his head and looked around the side of the door, were held not to have signed in his presence. The court said that the testator must be able to see the paper, if he will look, and to know for himself that it is the true one. But see, contra, Nock v. Nock's Ex'rs, 10 Grat. (Va.) 106 (1853). Where the subscription takes place in the same room with the testator, and he can see the table and the witnesses, it does not matter that he cannot see the will, the pen, or the hand that holds the pen as the witness writes. In re Tobin, 196 Ill. 484, 63 N. E. 1021 (1902). See, also, Ayres v. Ayres, 43 N. J. Eq. 565, 12 Atl. 621 (1887). "I am of opinion that under the act, where a paper is executed by the deceased in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign." Sir Herbert Jenner, in Newton v. Clarke, 2 Curt. 320 (1839). But the remark of Gorell Barnes, J., during the argument of Brown v. Skirrow, [1902] P. 3, 5, should be noted, namely: "You cannot be a witness to an act that you are unconscious of; otherwise, the thing might be done in a ballroom 100 feet long and with a number of people in the intervening space." Where the subscription takes place out of the room, and out of the presence of the testator, a subsequent acknowledgment of his signature by the witness is insufficient. Mendell v. Dunbar, 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277 (1897); Hindmarsh v. Charlton, reported post, p. 166. "The declaration of our statute that such an instrument shall be attested and subscribed in the presence of the testator, 'or else shall be utterly void and of no effect,' is very significant. * * * Acknowledgment of subscription is not the same in fact as actual subscription, and, in view of the statute, we do not think we have any right to decide that it is the same in law." Durfee, C. J., in Town of Pawtucket v. Ballou, 15 R. I. 58, 59, 23 Atl. 43, 2 Am. St. Rep. 868 (1885). But see Sturdivant v. Birchett, 10 Grat. (Va.) 67 (1853). On what constitutes subscription by a witness to a will in the presence of the testator, see 6 Am. & Eng. Ann. Cas. 414, note; 114 Am. St. Rep. 224, note; 1 Coffey's Prob. Dec. 39, note.

REED v. ROBERTS.

(Supreme Court of Georgia, 1858. 26 Ga. 294.)

LUMPKIN, J.[88] The issue in this case is, devisavit vel non. And the only question which we deem it necessary to discuss is, whether the will of John Nobbett was duly attested under the statute of frauds? The act of 29 Car. II, c. 3, requires that the attestation of the witnesses shall be in the presence of the testator. Was this provision complied with in this case?

The testator executed his will in extremis. He was very sick, and in great pain at the time, and died shortly afterwards. The bed upon which he lay had half stand-posts for curtains. There was a counterpane stretched across the head, to protect him from the air. Thus situated, he was raised up and supported, leaning on the shoulder of a friend, until he signed the will himself. It was then taken back of the head of the bed, to a chest, against the wall, some seven or eight feet distant, where it was attested by the subscribing witnesses. It is not pretended that he actually saw them. The weight of the testimony is, that he was unable, without help, to have changed his position, so as to have seen the witnesses subscribe. It is admitted that, by removing the curtain in the rear, and turning his head, or elevating his head above the level of the screen, and turning, or by being moved more toward the side of the bed, and turning his head and shoulders, so as to have looked around the post, he could have witnessed the attestation. Under this statement of facts, the court was requested to charge the jury, "that if the situation of parties was such that the testator might have seen the attestation of the will by the subscribing witnesses, by rising from his bed, it was not a good attestation; that he must have been able to have seen it in his actual position, at the time of attestation." Which charge the court gave to the jury, with the addition and qualification, "that if the testator might, by a slight effort, or by reaching out his hand and removing the counterpane and obstructions behind him, or by turning his head, shoulders and body in the bed, provided he was able to do so, have seen the witnesses subscribe and attest the will, it was a sufficient attestation, in his presence. But if it required any considerable effort for the testator to have seen the witnesses subscribe the will, it was not a good attestation."

The jury found a verdict in favor of the will, and counsel for the caveators moved the court to set it aside and direct a new trial, mainly on the ground, that the instruction given was a misdirection as to the law of the case. The application being refused, a writ of error is prosecuted to this court.

It cannot be denied that the courts, both in England and in this country, from a disposition to favor wills, have departed, not only

[88] The statement of facts is omitted, and part only of the opinion is given.

from the strict construction, but the obvious meaning, of the statute of frauds; and the result has been to open the door to very extensive litigation. Shires v. Glasscock, 2 Salk. 688; Davy v. Smith, 3 Salk. 395; Longford v. Eyre, 1 P. Wms. 740; Casson v. Dade, 1 Bro. C. C. 99; Tod v. Earl of Winchelsea, 2 Carr. & Payne, 488; Broderick v. Broderick, 1 P. Wms. 239; Doe v. Manifold, 1 Maule & Selw. 294, 12 Common Law Rep. 227; Right v. Price, Douglas, 241; Par. on Dev. 90–97; Roberts on Wills, 163–167; Longchamp v. Fish, 5 Bos. & Pull. 415; Russell v. Falls, 3 Har. & McH. (Md.) 457, 1 Am. Dec. 380; Edelen v. Hardey, 7 Har. & J. (Md.) 61, 16 Am. Dec. 292.

But, notwithstanding courts of justice have thus leant strongly in favour of the validity of wills fairly made, and where there is no imputation of fraud, still there is a limit prescribed by positive law, beyond which we cannot go. The witnesses must subscribe in the presence of the testator, in some sense, or else the statute requiring this to be done is judicially repealed.

The first case we have upon this subject is that of Shires v. Glasscock, reported in 2 Salk. 688, Carthw. 81, and 1 Equity Cases, Abridged, 403. It was decided in 3 Jac. II. about eleven years after the making of the statute, and has ever since been considered a leading case, and is constantly referred to. Let us for a moment examine this case, and compare it with the one before us, and the doctrine contended for in support of this will.

Sir George Shires, being sick in bed, made his will, and signed it in the presence of three witnesses; but, he being very ill, the witnesses withdrew into a gallery, seven yards distant, between which and the chamber, where the testator lay, there was a lobby, with glass doors, and the glass broken in some places. Here the witnesses subscribed the will. It was proved that the testator, from the bed where he lay, might have seen the table in the gallery, on which the witnesses subscribed, through the lobby and the broken glass window. Per Curiam: "The statute required attesting in his presence, to prevent obtruding another will in the place of the true one; it is enough if the testator might see; it is not necessary that he should actually see them signing; for at that rate, if a man should but turn his back, or look off, it would vitiate the will. Here, the signing was in view of the testator. He might have seen it, and that was enough."

This, now, is the case, and the judgment of the court upon it. But, in pronouncing the decision, it is added: "So if the testator, being sick, should be in bed and the curtain drawn." Let it be remembered that this latter point was not before the court; that it was a bald obiter dictum.

Well, the next case that came up is Davy v. Smith (3 Salk. 395), in which the question was, whether the witnesses to a will had pursued the statute of frauds in subscribing their names; and it was resolved that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there

set their names, at a table in the middle of the room, and opposite to the door, and both that and the door of the room where the testator lay were open, so that he might see them subscribe their names, if he would, though there was no positive proof that he did see them subscribe, yet that was a sufficient attestation, within the meaning of the statute, because the testator might have seen them subscribe. And therefore, per Curiam: "If the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed are drawn close, it is a good subscribing within the statute."

Here we have the bed curtain obiter in the previous case resolved to be law in this, with the word "close" superadded, which is not in the original case, upon a state of facts which did not at all justify it. And in this form the proposition has passed into the elementary books, and is cited as a precedent, namely, that signing in the room was signing in the presence of the testator, though the testator be in bed and the curtains closely drawn. And this illustration in Shires v. Glasscock, adopted as law in Davy v. Smith, is the foundation of all that class of cases which hold that, where the testator had the capacity to witness the attestation, by making some little effort, it was a sufficient compliance with the statute.

Let us hear no more fault finding after this with obiter dicta. Three-fourths of all the law in force in Christendom, as can be demonstrated by reference to the English and American reports, originated in the obiter dicta of courts and judges. And this is no random remark, recklessly made, but attested by an eminent jurist, now occupying one of the most elevated judicial positions in the Union.

Well may it be regretted that this doctrine of the constructive presence of the testator was ever carried so far. It has not only, in the language of Chancellor Kent, "opened the door to very extensive litigation," but lifted up a floodgate, through which a torrent is rushing that threatens to sweep away all the old landmarks of the law upon the subject of the execution of wills. And where will it stop? If any change in the position of the testator is required, how much or how little will do? Can any rule be prescribed? If the attestation is sufficient, provided it could be seen by the testator, by drawing aside the surrounding curtains, or elevating his head over the screen at his head, or by turning his head, shoulders and body in the bed, why not by changing the position of his whole body from the right side to the left, or even getting out of his bed? Nay, why stop at this? If the testator's situation be such that he cannot see the subscription by the witnesses by the exertion of his own power and volition, why should it not be sufficient to satisfy the requisition of the statute, according to this liberal and latitudinous construction of it, if the testator might cause himself or the witnesses to be placed in such a situation as he might see their attestation?

Presence is not defined in the statute. It is obviously not synonymous with being in the same room. A testator may see as accurately

what is passing in another room, as if done in the same room. And on the contrary, he may be so situated as not to see what is transacting in the same room where he lies, and thus have a false paper surreptitiously executed as his will. The object of the law can only be effectuated when the testator is so situated, both as to the will and the witnesses, that he may, if he choose, see both, in the act of attestation. And it is wholly immaterial whether the attestation be in the same room or in a different room. The rule is the same as to both. The will and the witnesses must both be in the preesnce of the testator. He ought to be able, without an effort or change of position, to see both. Perhaps it would be requiring too much to insist that it should be shown that he did actually see both. Witnesses engaged in the act of subscribing their names rarely watch to see if the testator at the same time is looking on. But it should appear, in the words of one of the cases, "that he was so present to them, and they to him, as that he might and probably did see the attestation." This we believe to be the sum and substance of the law, and the current of decisions; and that to go beyond this is dangerous and mischievous. It will never do to hold that, because a testator may change his situation, or cause it to be done, or remove any intervening obstruction (without doing either), and that thereby he might have seen the attestation, it will suffice.

The will of a blind man is an exceptional case, and one not very well settled. We leave that to be decided when the case occurs.

Why a desire to favor the wills of testators made in extremis should exist in this state we do not very well understand. Ordinarily, our statute of distribution makes the fairest disposition of a dead man's property. Here, a man advanced in life, weakened by disease, and racked with pain, is supported in bed while he subscribes his will. While in the act of executing his will, by which he bequeathes an estate of from $20,000 to $35,000 to the children by a second marriage, he forgets the amount of the pittance with which he cuts off the offspring of a former marriage, first saying, when the will was read to him, that he thought he had left to them $10 instead of $100, and then upon the second reading, $5 instead of $10! And yet the salutary safeguards of the statute of frauds are to be broken down and disregarded, to set up such a will! It is going quite far enough to say, in such a case, that the law is satisfied by the testator being in such a situation that he may, from that situation, and without change of position, and without aid from others, supervise the attestation.

In this case, after the testator signed, the witnesses retired obliquely behind the head of the bed, with a counterpane intervening between them and him. It is not pretended that he did see them attest the will. It is clear that by casting his eyes, as he lay, in any direction, the factum of the attestation was not within the scope of his vision. The probability from the proof is that he could not have changed his situation, from bodily infirmity and pain. He was certainly not as-

sisted to do so by others. The attestation, therefore, being out of the scope of the testator's vision, becomes bad, as not being in his presence. * * * Judgment reversed.[34]

CUNNINGHAM v. CUNNINGHAM et al.

(Supreme Court of Minnesota, 1900. 80 Minn. 180, 83 N. W. 58, 51 L. R. A. 642, 81 Am. St. Rep. 256.)

COLLINS, J. Gen. St. 1894, § 4426, provides: "No will, except such nuncupative wills as are hereinafter mentioned, shall be effectual to pass any estate, real or personal, or to change, or in any way effect the same, unless it is in writing, and signed at the end thereof, by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in his presence, by two or more competent witnesses." And the only question in issue on this appeal is whether the alleged will was attested and subscribed in the presence of the testator, Cunningham, by the two persons whose names were attached as witnesses.

The testator had been confined to his room for some time. It was a small bedroom with a doorway which led into a large room upon the north, the head of his bed being near the partition between the two. There was no door, but a curtain had been hung in the doorway, which was drawn to the west side at the time in question. Three days before the signing the testator sent for his attending physician, Dr. Adams, to come to his house, and draw his will. At the same time he sent for Dr. Dugan to be present as a witness. The draft of a will made by Dr. Adams as dictated by Cunningham was unsatisfactory, and both of the physicians went away. They were again summoned November 12, 1899, and went to the house in the forenoon. Dr. Adams drew a new will as instructed by Cunningham, the latter remaining in his bed. When the document was fully written, both men stepped to the bedside, and Dr. Adams read it to the sick man. Having heard it read through, Cunningham pronounced it satisfactory,

[34] "In the case before us, it does not appear whether the decedent was able to turn his head to one side or not. Two of the witnesses said that if he had turned his head to one side he could have seen the paper. If he could have done so without risk or danger, or not contrary to his physician's advice, and was of testamentary capacity (and there is no proof before us to the contrary), then there was a compliance with the statute in reference to the attestation. Cornelius v. Cornelius, supra [52 N. C. 593 (1860)]. But even if he was of testamentary capacity, and there was no fraud or undue influence, yet if he was unable to partly turn his head so that he might look and see the paper writing as it was being subscribed, the attestation was not according to the requirements of the statute." Montgomery, J., in Burney v. Allen, 125 N. C. 314, 320, 321, 34 S. E. 500, 502, 74 Am. St. Rep. 637 (1899). See Neil v. Neil, 1 Leigh (Va.) 6 (1829); Tribe v. Tribe, 1 Rob. Ecc. 775 (1849); Orndorff v. Hummer, 12 B. Mon. (Ky.) 619 (1852). Compare Walker v. Walker, 67 Miss. 529, 7 South. 491 (1890); Aikin v. Weckerly, 19 Mich. 482 (1870).

and then signed it. When so signing he sat on the edge of the bed, and used as a place for the paper a large book which was lying upon a chair. Drs. Adams and Dugan were then requested to sign as witnesses. For this purpose they stepped to a table in the sitting room, which stood about 10 feet from where Cunningham sat, and there affixed their signatures. The time occupied in so signing did not exceed two minutes, and immediately thereafter Dr. Adams returned to the bedside with the paper. Dr. Dugan stepped to the doorway, about three feet from Cunningham, and then Adams showed the signatures of the witnesses to him as he sat on the edge of the bed. Cunningham took the paper, looked it over, and said, in effect, that it was all right. From where he sat he could not see the table which was used by the witnesses when signing. He could have seen it by moving two or three feet. While they were signing he leaned forward, and inquired if the instrument needed a revenue stamp, to which Dr. Adams replied that he did not know, the reply being audible to Cunningham.

These are the salient and controlling facts found by the court below, on which it based an ultimate finding that the instrument so witnessed was attested and subscribed in the presence of the testator, and then affirmed the order of the probate court admitting it to probate as the last will and testament of the deceased.

The appellants (contestants below) insist that the attestation and subscription by the witnesses was insufficient, because Mr. Cunningham did not and could not see the witnesses subscribe their names from where he sat, and their contention has an abundance of authority in support of it from jurisdictions in which statutes copied from the English law on the subject, and exactly like our own, are in force. The rule laid down in these authorities is that the attesting and subscribing by the witnesses must take place within the testator's range of vision, so that he may see the act of subscribing, if he wishes, without a material change of his position; and that he must be mentally observant of the act while in progress.

Lord Ellenborough thus stated it in Doe v. Manfiold, 1 Maule & S. 294: "In favor of attestation it is presumed that, if the testator might see, he did see; but I am afraid if we went beyond the rule which requires that the witness should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is that, where the devisor cannot, by possibility, see the act doing, that is an act out of his presence."

Construing the same words in the Illinois statute, it was recently held: "The act of attestation consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature was made or acknowledged in their presence. It is this act of attestation by subscribing their names to the will as witnesses thereto which the statute requires to be in the presence of the testator. The

object of the law, as frequently declared, is to prevent fraud or imposition upon the testator, or the substitution of a surreptitious will; and to effectuate that object it is necessary that the testator shall be able to see and know that the witnesses subscribed their names to the paper which he has executed or acknowledged as his will. The purpose of the statute is not attained by mere ability to see the witnesses, or some part of them, but the act of attestation is the thing which must be in the presence of the testator. * * * It would not be an attestation in the presence of the testator, if he could not see the attestation, but merely understood from the surrounding circumstances that the act was taking place." Drury v. Connell, 177 Ill. 43, 52 N. E. 368.[35]

In brief, the courts have, almost without exception, construed a statute requiring an attestation of a will to be in the "presence" of the testator to mean that there must not only be a consciousness on the part of the latter as to the act of the witnesses while it is being performed, but a contiguity of persons, with an opportunity for the testator to see the actual subscribing of the names of the witnesses, if he chooses, without any material change of position on his part. And yet an examination of the decided cases wherein the ever-varying circumstances and conditions have been considered, and this rule applied, will convince the reader that the task of application has not been an easy one, and has led to surprising results at times. Some years ago a large number of American and English cases were collected in a note appended to Manderville v. Parker, 31 N. J. Eq. 242, and an examination thereof will show the absurd and inconsistent positions in which the courts have frequently placed themselves.

As will be seen from the facts surrounding the cases mentioned in this note, or cited in the text-books in support of this rule, it has been held almost universally that an attestation in the same room with the testator is good, without regard to intervening objects which might or did intercept the view; and also that an attestation outside the room or place where the testator sat or lay is valid if actually within his range of vision. And no court seems to have doubted that a man unable to see at all could properly make a will under the statute, if the witnesses attested within his "conscious" presence, whatever that means. Exactly why or how an exception in the case of one temporarily or permanently blind can be injected into this statute has not been attempted by any court or writer, so far as we know. Nor has there been any success in the effort to show why one kind

[35] "This court has frequently held that the attestation of a will, to be in the presence of the testator within the meaning of the statute, must take place within the uninterrupted range of testator's vision; that the 'presence' of the testator means contiguity, with such an uninterrupted view between the testator and the subscribing witnesses that he could, if so disposed, see the act of attestation, whether in the same room or in an adjoining room." Carter, J., in Schofield v. Thomas, 236 Ill. 417, 420, 86 N. E. 122, 124 (1908). Compare In re Bowling's Will, 150 N. C. 507, 64 S. E. 368 (1909).

of an intervening object—a partition wall, for instance—is better calculated to afford an opportunity for the perpetration of a fraud upon the testator than is another kind, say, the closed curtains of an old-fashioned bed, or the head or foot board of a bedstead, or any other article of furniture which happens to be an obstruction to the sight.

Again, it is difficult to see what sound distinction can be made, when applying the rule, between a case where the testator can see the witnesses attest, if he chooses to lean his body forward a few inches, and the case where the act can be seen if he steps forward the same distance. Or, take a case where a testator has been injured, and is compelled to lie on his back with his eyes fixed on the ceiling. Must the witnesses affix their signatures from an elevation in order to sign in his presence? No case has gone that far, and yet what difference would it make with such a testator in fact or in sound reason if the will was attested 10 feet distant, on a table in an adjoining room, or on a table the same distance from the bed, but in the same room?

Take the case at bar. The testator sat on the edge of his bed when the witnesses signed at the table in the adjoining room, a few feet distant, and within easy sound of his voice. If he could have seen them by leaning forward, the authorities in favor of upholding the will are abundant. Physically he was capable of stepping two or three feet forward, and from this point the witnesses would have been within his range of vision. It is extremely difficult to distinguish between the two cases, and yet it has been done again and again in applying the rule.

We might continue these suggestions and queries, as has been done quite frequently by courts which have not been entirely satisfied with a very rigid construction of the statute, and have not hesitated to say so; but it seems unnecessary, for there is one feature in these findings of fact which is sufficient, in our judgment, to warrant an affirmance, although there are many decisions to the contrary. As before stated, the court found that the witnessing of the will consumed not more than two minutes, and that immediately thereafter Dr. Adams returned to the testator while Dr. Dugan came to the doorway, not over five feet distant, whereupon the former "showed the signatures of the witnesses to the testator. The latter took the will, looked it over, and said in effect that it was all right."

To say that this was not a sufficient attestation within a statute which requires such attestation to be in the "presence" of the testator, simply because the witnesses actually signed a few feet out of the range of his vision, is to be extremely technical without the slightest reason for being so. The signing was within the sound of the testator's voice; he knew what was being done; the act occupied not more than two minutes; the witnesses returned at once to the testator; their signatures were pointed out to him; he took the instrument into his own hands, looked it over, and pronounced it satisfactory. The whole affair, from the time he signed the will himself

down to and including his expression of approval, was a single and entire transaction; and no narrow construction of this statute, even if it has met the approval of the courts, should be allowed to stand in the way of right and justice, or be permitted to defeat a testator's disposition of his own property.

In Cook v. Winchester, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822, it was said: "In the definition of the phrase 'in the presence of' due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence."

But, as was said, in substance, in the same case, we agree that this will was validly executed expressly on the ground that the whole transaction was an entirety in fact, and that, immediately after the witnesses had attested, the instrument was returned by them to the hands of the testator, his attention was called to their signatures, and he expressed his satisfaction and approval of what had been done. This view, which does no violence to the spirit and intent of the statute, is not without precedent and authority aside from the Michigan case, although it may, as said by the court below, run contrary to a majority of the decisions. See Sturdivant v. Birchett, 10 Grat. (Va.) 67, and Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464. Judgent affirmed.[36]

In re GOODS OF PIERCY.

(Prerogative Court of Canterbury, 1845. 1 Rob. Ecc. 278.)

Charlotte Piercy died in February, 1845, having just before her death executed her will. She was very ill in bed, and totally blind, but in full possession of her mental faculties. The will was prepared according to her directions, and read over to her. In the presence of the attesting witnesses she signed her name in bed, one of them having placed her hand on that part of the paper where it was necessary for her to sign. By reason of there not being any table or other convenience in the bedroom on which the witnesses could sign their names, they all proceeded immediately to an adjoining room on the same floor, across a landing or passage, and there within view of the bedroom, the doors of both rooms being open, respectively subscribed their

[36] See Cook v. Winchester, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822 (1890); Healey v. Bartlett, 73 N. H. 110, 59 Atl. 617 (1904); Church of St. Vincent de Paul v. Brannan, 97 Minn. 349, 107 N. W. 141 (1906). See, also, 1 L. R. A. (N. S.) 393, note.

names. A plan of the rooms was laid before the court, and in a second affidavit it was sworn, that the testatrix, from her bed, could have seen the witnesses at the table when they signed, had she had her eyesight.

Addams, on these facts, moved the court for probate.

Sir HERBERT JENNER FUST. When this case was moved on a former occasion, there was no evidence to show that the testatrix could have seen the witnesses sign, had she had her eyesight, and I felt I could not place her in a better position than one who could see. It does not appear whether there were curtains to the bed; still, as it is positively sworn by two witnesses that she could, had she had her sight, have seen from her bed the witnesses subscribe, I cannot refuse this application.[37]

RIGGS v. RIGGS.

(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 238, 46 Am. Rep. 464.)

MORTON, C. J.[38] The only question presented by this report is as to the sufficiency of the attestation by the witnesses to the will and codicil of the testator.

The statutes provide that, in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. St. c. 92, § 6; Pub. St. c. 127, § 1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appeared that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar statutes, that such an attestation is not sufficient. See Aikin v. Weckerly, 19 Mich. 482, 505; Downie's Will, 42 Wis. 66; Tribe v. Tribe, 13 Jur. 793; Jones v.

[37] See Ray v. Hill, 3 Strob. (S. C.) 297, 49 Am. Dec. 647 (1848); Clifton v. Murray, 7 Ga. 564, 50 Am. Dec. 411 (1849).

"In the case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses. But whether a person is blind or can see, an attestation is certainly not in his presence if he has no conscious personal knowledge of the act and is merely told that it has been performed in another room." Cartwright, C. J., in Calkins v. Calkins, 216 Ill. 458, 464, 75 N. E. 182, 183, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233 (1905).

[38] The statement of facts is omitted.

Tuck, 48 N. C. 202; Graham v. Graham, 32 N. C. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence.

In England, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. Piercy's Goods, 1 Rob. Ecc. 278; Fincham v. Edwards, 3 Cur. Ecc. 63. It would be against the spirit of our statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will.

The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe "in his presence"; but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion, therefore, that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, and as a part of the res gestæ, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the

reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed. Decree affirmed.[39]

MOORE v. KING.

(Prerogative Court of Canterbury, 1842. 3 Curt. 243.)

Robert King died on the 16th of August, 1842. By his will, dated the 22d of March, 1841, he appointed C. H. Moore, and his brother E. R. King to be his executors, and named his said brother his residuary legatee.

On the 8th of August, 1842, the deceased, being confined to his bed by illness, requested his sister, Mrs. Coape, to bring him materials for writing, and upon her doing so, he wrote a codicil (A) in the presence of Mrs. Coape, and she, at his request, subscribed her name thereto in his presence; no other witness was present at the time.

On the 8th of August, 1842, Sir D. Davies, the medical attendant of the deceased, paid him a visit, on which occasion the deceased requested Mrs. Coape to give him the paper (A), and showing the same to Sir D. Davies, said, "This is a codicil to my will, signed by myself and by my sister, as you will see at the bottom of the paper, you will oblige me if you will also add your signature, two witnesses being necessary." Sir D. Davies thereupon placed the paper on a chest of drawers by the bedside of the deceased, and subscribed his name thereto; Mrs. Coape, standing beside him at the time, said, pointing to her name signed at the bottom of the paper, "There is my signature you see, you had better place yours underneath."

[39] See Raymond v. Wagner, 178 Mass. 315, 59 N. E. 811 (1901), where the witnesses signed in another room separated by an entry from that where the testatrix lay. "The bed was in such a position that the testatrix by raising herself slightly from the hips could see into the room where the witnesses were and could see the witnesses as they signed; that is, as we understand, could see them in the act of writing their names upon the paper. It was doubtful whether the testatrix could have raised herself." The court "assumed * * * that the testatrix was conscious, and knew and heard and understood what was done," and held the attestation to have been in the presence of the testatrix. The court said: "If the position of the subscribing witnesses and of a testator and their proximity to him are such that, but for some physical infirmity which did not otherwise affect him, he could see or hear what they were doing, and if he was conscious of and knew and understood what took place, then we think that the subscribing witnesses are to be regarded as subscribing in his presence. It is not the matter of juxtaposition merely, but the result as a whole that is to be looked at. * * * Certainly the mere fact that the subscribing witnesses were twelve or fifteen feet from the testatrix could not of itself prevent them from being in her presence. A case might be conceived where the subscribing witness might be in the line of vision of the testator, but at such a distance that it would be plain that they could not be regarded as being in his presence. But that is not the case here." 178 Mass., at page 318, 59 N. E., at page 812.

On the 7th of November, 1842, the court was moved to admit this paper (A) to probate, the court rejected the motion, and directed the paper to be propounded. An allegation was given in by the executor, Mr. Moore, propounding the paper, and was opposed by Mr. King the other executor and residuary legatee.

Sir HERBERT JENNER FUST. The question before the court is one of great importance with regard to the construction of the Wills Act (1 Vict. c. 26). It turns upon the due execution of a paper bequeathing personal property, which is now regulated by the same law as regulates the disposition of real property. The duty imposed upon the court is to find its way to a due and proper construction of the whole of the act; not of one single isolated clause, but of the entire intention of the Legislature in passing the act. This case must form a leading case of its class; two other cases, of a similar nature, have been brought before the court, but only on ex parte motion; unfortunately they were cases, where the property involved in the decision was so small, as to render them unable to bear the expense of litigating the point. As far as I am able to judge, the present case differs in some respects from both those cases. In the Case of Allen, 2 Curt. 331, the paper was attested by the one witness alone present on one day, the deceased having then signed it in her presence; on a subsequent day it was signed in the presence of a second witness, and attested by that witness in the presence of the first, but the first witness was not called on to attest the second execution. The court was of opinion that the execution was not sufficient. The other case of In re Simmonds, 3 Curt. 79, was very similar.

In this case, as has been observed, there is this material distinction; the deceased having in the first instance signed the paper in the presence of his sister alone, does on a subsequent day acknowledge his signature in the presence of his sister, and his sister pointed out her signature to the second witness, but I do not understand, that the deceased desired her to re-attest the acknowledgment of his signature. I admit all that has been said as to the construction of statutes, and the interpretation put upon the Statute of Frauds as to signing by the testator, but is the same interpretation applicable to the subscription of the witnesses?

It has been argued, under the present statute, as against the admission of this allegation, that although this might have been a good subscription under the Statute of Frauds, it is not sufficient under the altered language of the present act; on the other side, it has been said, that a construction is to be put on this act the same as if on the Statute of Frauds; but it must be remembered, that the doubts, expressed by judges of courts of law and equity on the Statute of Frauds, led to the introduction of the present act. It has been well said, that the 1 Vict. c. 26, is not an original act, but an act to amend a former law; so it is—it is an act to amend a former law, for re-

moving all doubts whatever existing with regard to that law, and I find in the 9th section of the new act, a considerable departure from the language of the corresponding section (5th) of the Statute of Frauds.

The language of the 9th section of 1 Vict. is expressly prohibitory: "No will shall be valid unless it be in writing, and signed at the foot or end thereof"—clearly thereby intending to remove all doubts, in regard to the construction of the Statute of Frauds, as to signing by putting the testator's name at the beginning of the will—"and such signature shall be made or acknowledged by the testator." It had been formerly doubted, under the Statute of Frauds, whether an acknowledgment of the signature was sufficient, whether the will must not be actually signed in the presence of the witnesses; here again, all doubt is removed by the present section. Under the Statute of Frauds it had been held, that the witnesses need not be all present at the same time, the signature might be acknowledged to the three or more witnesses at different times; again, by the present act, all doubt on that point is removed, the witnesses must be present "at the same time."

Now, when I clearly find, that the object of this act is to remove every possible doubt—thereby taking away all latitude and discretion in its interpretation—and that it expressly provides that the two witnesses, who are to be present at the same time, shall attest and subscribe, can I hold that the one may attest and subscribe on one day, and acknowledge his or her signature on a subsequent day? I am inclined to think that the act is not complied with, unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not re-subscribe. The act says the testator may acknowledge his signature, but does not say that the witnesses may acknowledge their subscription. I reject the allegation.[40]

[40] See Wyatt v. Berry, [1893] P. 5; Brown v. Skirrow, [1902] P. 3. The mutual presence of witnesses is required in a few American jurisdictions. Roberts v. Welch, 46 Vt. 164 (1873). See, also, Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94 (1889). On the objection to such a requirement, see Parramore v. Taylor, 11 Grat. (Va.) 220, 255 (1854).

FLEMING v. MORRISON.

(Supreme Judicial Court of Massachusetts, 1904. 187 Mass. 120. 72 N. E. 499 105 Am. St. Rep. 386.)

Francis M. Butterfield had Sidney S. Goodrich draw up a will for Butterfield leaving all of Butterfield's property to Mary Fleming. Butterfield then signed it and had Goodrich sign as a witness. Later he had two other people sign as witnesses. The further facts appear in the opinion. The will having been admitted to probate, this appeal was brought.

LORING, J.[41] * * * The finding that, before Butterfield and Goodrich "parted," Butterfield told Goodrich that the instrument which had been signed by Butterfield as and for his last will and testament, and declared by him to be such in the presence of Goodrich, and attested and subscribed by Goodrich as a witness, "was a fake, made for a purpose," is fatal to the proponent's case. This must be taken to mean that what had been done was a sham. This is not cured by the further finding that what Butterfield meant by this was "that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him (Butterfield) to sleep with her."

This is not a finding that Butterfield intended to sign the instrument before Goodrich as and for his last will and testament, leaving the further execution to depend on future events. Much less is it a finding that Butterfield changed his mind after he had signed, and had had Goodrich attest and subscribe the instrument. The whole finding, taken together, amounts to a finding that Butterfield had not intended the transaction which had just taken place to be in fact what it imported to be; that is to say, a finding that when Butterfield signed the instrument, and asked Goodrich to attest and subscribe it as his will, he did not, in fact, then intend it to be his last will and testament, but intended to have Mary Fleming think that he had made a will in her favor to induce her to let him sleep with her. * * *

The punctum temporis in case of a will is when it is signed, or, having been previously signed, when the signature is acknowledged in the presence of three or more witnesses. And where that is done before each witness separately, as it may be done in this commonwealth (Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687), the animus testandi must exist when it is signed or acknowledged before, and attested and subscribed by, each of the necessary three witnesses. If this is not done, the statutory requirements have not been complied with.

[41] The statement of facts is abbreviated, and part only of the opinion is given.

Assuming that the acknowledgment animo testandi of a signature not originally made with that animus is enough, the will in the case at bar would have been duly executed had Butterfield subsequently acknowledged the instrument before three in place of two additional witnesses. But he did not do so. The instrument, having been acknowledged and attested and subscribed by two witnesses only, is not a valid will, within Rev. Laws, c. 135, § 1. * * *

Decree to be entered reversing decree of probate court, and disallowing the instrument as the will of Butterfield.

SECTION 6.—THE ORDER OF SIGNING

HINDMARSH v. CHARLTON.

(House of Lords, 1861. 8 H. L. Cas. 160.)

This was an appeal from a decision awarding the plaintiff letters of administration of the personal estate of Joseph Hindmarsh, deceased. The appellant claimed that there was a valid will of December 17, 1857, under which he was residuary legatee.

The evidence of Mr. Frederick William Napoleon Wilson, surgeon, one of the witnesses, was: "On the forenoon of the 17th December, 1857, I saw Mr. Hindmarsh. I was asked by him to sign his will as a witness, and the will was brought out, both parts. He looked at it, and said that was his will. I wrote at the bottom, 'Witness to the above will and testament and signature,' and then my name, 'Fred. Wm. Nap. Wilson,' on both papers. In the afternoon. Dr. White came. In the room Dr. White examined the patient as to his health. The doctor and I then went into the other room, where we had a consultation. I had suggested to Hindmarsh before we left the room, that he had better have another witness. Dr. White took the will in his hand, and we went back to the room where Hindmarsh was. Dr. White asked Hindmarsh if that was his will. He said, 'Well, I can't see very well, get me my spectacles.' The housekeeper gave him his spectacles, and he sat up in the bed, and looked at the paper, and said, 'Yes, that is my will, and this is my signature.' At a small table, at the head of the bed, and close to the bed, Dr. White signed his name. After he had signed it, I took the papers and went across to the window, where there was another table, and sat down in an armchair; and then, after some conversation about the date being added, I distinctly remember retouching my name, by putting a cross on the *F* on the paper which is uppermost, and then I added the date in both wills, and then, I believe, the documents were both given to the housekeeper."

On cross-examination, he said, "I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the omission. This was merely in pursuance of my habit. * * * I thought it was better to complete the name. I thought adding the date was equal to a repetition of the signature. I think I had no other intention. It was by the date I intended to repeat my signature. My sole object was to supply the omission, to make the name complete. I was attesting the will, and I thought it necessary to have a complete signature. My object was to make the signature of the morning complete."

The cause was heard before the Judge Ordinary, and on the 18th May, 1858, judgment was pronounced in favor of the plaintiff in the suit, on the ground that the facts proved did not amount to a due attestation of the will according to the provisions of the 1 Vict. c. 26. The verdict for the defendant was, therefore, ordered to be set aside, and a verdict entered for the plaintiff. This was an appeal against that decision.

The LORD CHANCELLOR [Lord CAMPBELL].[42] * * * The Act of 1 Vict. c. 26, § 9, requires that a will to be valid "shall be signed at the foot, or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator."

It is settled by the case of White v. The British Museum, 6 Bing. 310, and other decisions to the same effect, that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator. The question in this case is, whether that which took place was a subscription of the witnesses, whose subscription is in question, or not.

I will lay down this as my notion of the law: that to make a valid subscription of a witness, there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was meant to represent the name. The horizontal stroke made by the witness was merely intended to perfect the letter *F* in the same manner as if he had perfected the letter *i* by putting a dot over it, which he had not dotted in the morning. Now, can that be considered as amounting to a subscription?

It was an acknowledgment by him of his former signature written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is

[42] The statement of facts is abbreviated, the concurring opinion of Lord Cranworth is omitted, and parts only of the other opinions are given.

not sufficient. When I was at the bar, there was a question whether the acknowledgment of the signature, by a witness putting a dry pen over it would be sufficient, but since that time it has been decided that it would not be sufficient; but this does not, in my opinion, amount to a subscription, because whether the *i* was dotted, or the horizontal stroke was put to the *F*, to perfect the word, it was not intended that either the dot or the horizontal stroke should represent the name; the name was written in the morning, and that would continue both till and after the evening, as the subscription of the witness.

I regret very much that we are compelled to hold this instrument to be an invalid will, but we are constrained so to do by the act of Parliament; and therefore I must advise your Lordships that this appeal be dismissed.

Lord CHELMSFORD. I regret to have to agree with my two noble and learned friends, that the will was not duly executed, as required by 1 Vict. c. 26. To render a will valid, the signature or acknowledgment of the testator must be in the presence of two witnesses, present at the time, and the witnesses must attest and subscribe the will in the presence of the testator. * * *

If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the act. For there would really have been only one complete subscription. But the omission of the cross to the *F* in his Christian name, did not make the signature imperfect. For Mr. Wilson states, that he very often omitted to put the cross at all; and he did not add the cross to complete his signature, so as virtually to subscribe anew, but merely in pursuance of his habit of supplying the omission when he noticed it. * * *

The LORD CHANCELLOR. The appeal will be dismissed, without costs.

Decree affirmed, and appeal dismissed, without costs.

BROOKS v. WOODSON et al.

(Supreme Court of Georgia, 1891. 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160.)

BLECKLEY, C. J.* There is nothing to distinguish this case from Duffie v. Corridon, 40 Ga. 122, except that in the execution and attestation of this will there was but one transaction, the witnesses all subscribing the unsigned will in the presence of the testator, and he, at the same time and place, and immediately after they affixed their signatures, signing the document in their presence. In Duffie v. Corridon there were two interviews, at the first of which two of the witnesses (together with another who was not afterwards present) subscribed, and at the second the testator and the third witness.

* The statement of facts is omitted. The testator signed by mark.

But is this difference in the facts of the two cases material? The doctrine distinctly held by the court in ruling Duffie v. Corridon is that, until the testator signs, there is nothing to attest; the signature of the testator being the principal, if not the only, matter to which the attestation contemplated by law applies. It is obvious that, if this be the true reason why the witnesses cannot subscribe their names until after the testator has signed his, it is of no consequence, when the form of attesting an unsigned will is gone through with, whether on the same occasion of the testator's added signature or on a previous occasion. In either case, the attesting act would be performed when there was no signature in existence to be attested, and therefore no subject-matter to which the act could apply. To witness a future event is equally impossible, whether it occur the next moment or the next week.

We rule the present case on the authority of the prior one above cited; being satisfied, after careful examination, that to abide by the principle of that decision we must regard the order of time in which the respective signatures occur, rather than the interval of time by which they are separated. The manifest teaching of Duffie v. Corridon is that the testator must sign first. That teaching is not followed, but directly violated, when the witnesses sign first. Judgment [refusing probate] affirmed.[43]

[43] "It is quite plain that if the true interpretation of our statute is that the witnesses are to attest, by their subscription, the testator's signature, or acknowledgment of signature, an instant of precedence on their part will render that impossible. There is no force in the argument that, in case of an uninterrupted transaction, the orderly course of procedure is not material. The case is not one of a rule that may be relaxed, but one of interpretation of language which, in the nature of things, must be rigid. Once it is determined what the words of the statute mean, they must, under all circumstances, have that meaning. It is not permissible to hold that 'follow' can ever mean 'precede.' Besides, such a judicial modification of the statute—for that it must be—would be unsafe. Witnesses subscribing a will, on the faith that the testator will immediately sign it, can retain no dominion over the paper, and can in no way recall their act or advertise its abortion if the testator fails in his part. Protection, as well of the witnesses as of the testator, demands that there shall be signature before attestation. Arguments based on a loose practice with other than testamentary writings is valueless, for their validity does not depend on due attestation." Collins, J., in Lacey v. Dobbs, 63 N. J. Eq. 325, 341, 50 Atl. 497, 504, 55 L. R. A. 580, 92 Am. St. Rep. 667 (1901). See Lane v. Lane, 125 Ga. 386, 54 S. E. 90, 114 Am. St. Rep. 207 (1906); Marshall v. Mason, 176 Mass. 216, 57 N. E. 340, 79 Am. St. Rep. 305 (1900); Hindmarsh v. Charlton, reported ante, p. 166. See, also, 114 Am. St. Rep. 234, note; 5 Am. & Eng. Ann. Cas. 463, note; 12 Prob. Rep. Ann. 286, note.

"We think, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first. This would be the usual order of signature." Taylor, J., in Allen v. Griffin, 69 Wis. 529, 533, 35 N. W. 21, 22 (1887).

Where the testator and one witness signed the will in the presence of each other, and then the witness copied it, and signed the attestation clause on the copy, and left the copy at the home of the testator, who signed it, and had the other witness sign it, it was held that the two copies did not constitute one will; that neither copy was executed, as neither was subscribed in the

GIBSON v. NELSON et al.

(Supreme Court of Illinois, 1899. 181 Ill. 122, 54 N. E. 901, 72 Am. St. Rep. 254.)

CARTER, J. Upon their bill brought to contest the last will, and the probate thereof, of Leander E. Nelson, deceased, the appellees obtained a decree based upon a verdict of the jury that the will had not been signed by the testator when the attesting witnesses signed their names as witnesses to the instrument, and that it was not the last will of the deceased, and it was accordingly set aside. The record is now before us on the appeal of James W. Gibson, the principal legatee and devisee.

While there was some controversy of fact, yet we think the effect of the testimony of the subscribing witnesses was that they subscribed their names as witnesses to the instrument, as the last will of the testator, at his request and in his presence, but that he did not sign the will until after the signatures of the witnesses had been affixed; that the witnesses and the testator were all present at the time; that it was on the same occasion, and was one transaction, completed when all were present, but that in the mere order of signing the witnesses preceded the testator.

On behalf of the contestants, the court gave to the jury the following instruction: "The jury are instructed that, in order that a will be properly attested and be a valid will, it is necessary that the attesting witnesses subscribe their names to the same as witnesses in the presence of the testator and at his request, and that the name of the testator be signed to the instrument before the signatures of the attesting witnesses are attached; and you are instructed that if you find, from the evidence, that the signature of Leander E. Nelson was not attached to said instrument, so offered here as his will, until after the names of the attesting witnesses were attached thereto, then said instrument is not the last will and testament of said Nelson, and it is your duty so to find."

The question is thus presented for decision whether, under our statute of wills, an instrument intended as a will, appearing to have been executed and witnessed with all the formalities required by the statute, must fail to take effect as a will merely because the act of the testator in signing the will followed that of the witnesses, though done in their presence, on the same occasion, and as a part of one entire transaction.

Section 2 of the act in regard to wills, so far as it affects this question, provides: "All wills * * * by which any lands, * * *

presence of the testator by two witnesses, as required by the statute; and that the attestation on the original could not count on the second, because not on the sheet of paper containing testator's signature, nor physically connected therewith. In re Baldwin, 146 N. C. 25, 59 S. E. 163, 125 Am. St. Rep 466 (1907). Compare Notes v. Doyle, 32 App. D. C. 413 (1909).

goods and chattels are devised shall be reduced to writing and signed by the testator or testatrix, or by some person in his or her presence and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will * * * in their presence, or acknowledge the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will * * * to admit the same to record; * * * and every will, * * * when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded, * * * and shall be good and available in law," etc.

It will be noticed that the statute does not in terms require the subscribing witnesses to attest or certify that the will was signed by the testator before they subscribed their own names; and in Hobart v. Hobart, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151, we held that, where the testator acknowledged the will to be his act and deed, that was sufficient, without acknowledging specifically and in terms that he had signed it; that, as it would not be a will without his signature, it would, in the absence of proof, be presumed from his statement that it was his will, and that he had signed it. In that case it was pointed out that decisions based upon the English statute, and the statutes of New York and other states, requiring specifically that the signature be made or acknowledged in the presence of the witnesses, were not applicable here, where the statute requires that the testator acknowledged merely the will.

It cannot, of course, be presumed in the case at bar that at the precise moment when the witnesses subscribed their names to the instrument the testator had signed it, for they testified to the contrary on the trial below; but he signed it in their presence, as required by the statute, and the several acts of signing by the testator and witnesses took place on the same occasion, and constituted one transaction, viz. the execution and attestation of the will. Must the instrument be held inoperative as a will merely because the testator and the witnesses did not observe the usual order, in point of time, in signing their names? To so hold would, in our opinion, require a greater degree of nicety in the execution of wills than is required by the statute.

Suppose the draftsman of a will has read it over to the testator, and the testator, having approved it, requests him to subscribe his name as a witness, and he does so at the time and in the presence of the testator, and then hands the pen to the testator, who thereupon signs the will; is there any provision of the statute or rule of law which would require the courts to take notice of the dif-

ference in the moment of time intervening between the two acts of signing, where both were parts of one transaction? We know of none. It would not be physically impossible for the testator and the witnesses to sign at the same time, yet, under the rule contended for and as held by the court below, the will would be invalid because the testator did not sign first. Undoubtedly, the proper order is for the testator to sign first, for after the witnesses had signed he might never sign, or might sign on some other occasion or out of their presence, which would not be a compliance with the statute; but we are not prepared to hold that the validity of the instrument as a will can be made to turn upon the mere order in which the signatures are attached to the instrument, where all are attached at the same time.

We are referred to cases, both English and American, which have so decided, but we do not regard the reasoning employed satisfactory when applied to a case arising under our statute.

In Chase v. Kittredge, 11 Allen (Mass.) 63, 87 Am. Dec. 687, while it was said that a will was not sufficiently witnessed where the witnesses signed their names before the testator signed, still the fact was, in that case, that one of the witnesses had not only signed his name before the testator had, but had signed it out of the presence of the testator. Still, it has undoubtedly been held in many cases that a will signed by the attesting witnesses before it was executed by the testator, though on the same occasion, is not entitled to probate. We are of the opinion, however, that, as applicable to cases arising under our statute, cases holding to the opposite view are sustained by the better reasoning.

In O'Brien v. Galagher, 25 Conn. 229, the court said: "Where, as in the present case, witnesses are called to attest the will, and, being informed what the instrument is, subscribe their names thereto as witnesses, and the testator on his part and in their presence duly executes the instrument as his will, and all is done at one and the same time, and for the purpose of perfecting the instrument as a will, we cannot say that it is not legally executed, merely because the names of the witnesses were subscribed before that of the testator."

So, also, in Rosser v. Franklin, 6 Grat. (Va.) 1, 52 Am. Dec. 97, it was held that "the mere fact whether, in the order of time, the testatrix made her mark before or after the subscription of the witnesses, is, under the circumstance, in no wise material, insomuch as the whole transaction must be regarded as one continuous, uninterrupted act, conducted and completed within a few minutes, while all concerned in it were present, and during the unbroken supervising attention of the subscribing witnesses."

So, too, in Miller v. McNeill, 35 Pa. 217, 78 Am. Dec. 333, the court said: "Our statute contemplates, undoubtedly, a signature by the testator, and then a signing by witnesses in attestation of the signature; * * * but when a transaction consists of several parts

all of which occur at the same moment and in the same presence, are we required to undo it because it did not occur in the orderly succession which the law contemplates? No language of our statute of wills imposes any such necessity upon us, and we would not decide anything so unreasonable except under stress of very positive statutory language. The execution and attestation of the will were contemporaneous, or, rather, simultaneous, acts, and we will not regard the question who held the pen first,—the testator or his witnesses."

In 1 Redf. Wills, *226, it is said: "The particular order of the several requisites to the valid execution of a testament is not at all material, provided that they be done at the same time and as a part of the same transaction."

These authorities, and others following them, hold, in our opinion, the more reasonable rule. To invalidate such a will, otherwise properly executed and attested, would enable a witness, after the lapse of many years, to defeat its operation by proof of an unimportant fact which few could then remember. How may witnesses to wills, unaided by presumptions and inferences which arise from the ordinary cause of procedure in the execution of wills, could remember as a fact that the testator signed the will first?

While it is true, as contended, that the instrument is not a will until it has been executed by the testator, and cannot be attested as a will by the witnesses without such execution, it is also true that it is not a complete will until it has been attested by the necessary witnesses, the statute requiring both. While this attestation required by our statute includes the subscription of their names by the subscribing witnesses, it means much more; that is, that they bear witness and certify to the facts required by the statute to make a valid will. Swift v. Wiley, 1 B. Mon. (Ky.) 114.

The mere physical act of signing their names does not constitute the whole, nor the most important part, of the duty of attesting witnesses. If all of the several acts required by the statute are done upon the same occasion, in the presence of the testator and the attesting witnesses, and, as said in the case cited above, under their unbroken supervising attention and as parts of one entire transaction, we cannot hold that the instrument is rendered inoperative as a will by merely proving the fact that the signatures of the witnesses were affixed before the signature of the testator.

In the case at bar this fact did not appear by the testimony of the subscribing witnesses given in the probate court when the will was admitted to probate, but they testified to it on the hearing of the issue in this case in the circuit court. The will upon its face appeared to have been properly executed and witnessed, and the mere fact, which appeared by the evidence, that the testator signed it after the witnesses had signed, was rendered harmless by the further fact, shown by the evidence, that these several acts of signing were done at the same

time and as parts of the same transaction. The court erred in giving the instruction in question.

The judgment will be reversed, and the cause remanded. Reversed and remanded.[44]

SECTION 7.—THE WITNESSES' SIGNATURES AND THE ATTESTATION CLAUSE

In re WALKER'S ESTATE.

(Supreme Court of California, 1895. 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.)

HENSHAW, J. Appeals from the judgment revoking the probate of a will and from the order denying a motion for a new trial.

The facts disclosed by the evidence without conflict are as follows: The will of Ozias Walker, deceased, was written by C. G. Warren, the attorney at law of the testator, and was executed in the presence of H. C. White and C. G. Warren, who were requested by the testator to attest, as witnesses, its execution. The requirements of the statute were complied with in all respects saving that the witness C. G. Warren, in signing his name as a witness at the end of the will, inadvertently wrote the name "C. G. Walker," thus employing his own initials but the testator's surname.

Upon this showing the court revoked the probate of the instrument, and the propriety of its action in so doing is the sole question presented upon this appeal.

At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the consti-

[44] See Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808 (1896); In re Shapter's Estate, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216 (1905); Horn's Estate v. Bartow (Mich.) 125 N. W. 696 (1910). See, also, 114 Am. St. Rep. 233, note; 5 Am. & Eng. Ann. Cas. 463, note; 12 Prob. Rep. Ann. 289, note.

In International Trust Co. v. Anthony, 45 Colo. 474, 101 Pac. 781, 22 L. R. A. (N. S.) 1002 (1909), both witnesses saw the testator execute a codicil and publish it as such, but only one subscribed it in his presence; the other subscribing it some days later out of testator's presence. The court held that, by mentally observing it in testator's presence and later writing his name as attesting witness out of testator's presence, the witness did not "attest" it in testator's presence. The court said (Bailey, J.): "We have neither hesitancy nor doubt in declaring, under the requirements of our statute governing the execution, proof, and probate of wills, considered at large, that the word 'attested,' by intent of the Legislature, includes not only the mental act of observing, but as well the manual one of subscription. * * * The term comes from the two Latin words, 'ad' and 'testari,' which mean literally to witness or to bear witness, and by all authority the term 'witnessed' includes 'subscription.'" 45 Colo. 476, 101 Pac. 782, 22 L. R. A. (N. S.) 1002. Compare Notes v. Doyle, 32 App. D. C. 413 (1909). On the meaning of "witnessed" in a statute about wills, see In re Boyeus, 23 Iowa, 354 (1872).

tution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise. As has been said (In re O'Neil, 91 N. Y. 521): "While the primary rule governing the interpretation of wills when admitted to probate recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature."

As a prerequisite to the exercise of the testamentary right in this state, the legislature has prescribed for the execution and authentication of wills such as this the following requirements: "(1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. (2) The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. (3) The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will. And (4) there must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence." Civ. Code, § 1276.

It is not for courts to say that these requirements, or any of them, are mere formalities, which may be waived without impairing the status of the instrument. It is not for courts to say that a mode of execution or authentication, other than that prescribed by law, subserves the same purpose, and is equally efficient to validate the instrument. The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates.

It may be freely conceded that the question under consideration is of a nature purely technical, but it is to be remembered that the whole subject-matter of the execution and authentication of wills is technical, and nothing else; and it must not be forgotten that the technicalities are those which the lawmaking power has the right to impose, and has imposed, upon the maker of a will.

It will be noted in the section of the Code above quoted that the duty enjoined upon the testator is to subscribe the will, while that imposed upon the attesting witnesses is that each must sign his name as a witness. The difference is neither immaterial nor accidental. A testator may be illiterate, or he may, by reason of paralysis, or other disabling cause, be incapacitated from signing his name, and the law has wisely and liberally provided for the due execution of a will by one so situated. It has required of him that he shall subscribe, and. while the word unquestionably has for one of its significations the signing

of a name, it is a verb of comprehensive meaning. Any form or kind of underwriting is a subscription, and generally it has been held that any mark or writing by the testator meant by him to be his name, or to take the place of his signature, or to serve for his identification, will answer the requirements of a statute which calls merely for subscription or signing.

The same liberality of construction and interpretation has been put by the courts upon statutes which require the witnesses merely to subscribe or to sign.

There are thus numerous cases under such statutes which hold, in effect, that any signing by which alone, or by which aided by parol evidence, the identity of the subscriber may be ascertained, substantially complies with the statute.

The case of the appellant upon this proposition cannot be more strongly stated than in the following extracts from the learned work of Mr. Jarman, discussing the Victorian Wills Act:

"Examining the requirements common to the statute of frauds and the wills act in their order, the next condition prescribed for the validity of a will is that it should be signed, which suggests the inquiry, what amounts to a 'signing' by the testator? It has been decided that a mark is sufficient, and that notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice. And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark), or that against the mark was written a wrong name." 1 Jarm. Wills (6th Ed.) *79.

"The next statutory requisition, which is common to the old and the present law, is that the will be 'attested and subscribed' by the witnesses. A mark has been decided to be a sufficient subscription. * * * The initials of the witnesses also amount to a sufficient subscription, if placed for their signature as attesting the execution. * * * A witness need not sign his own name if the name actually subscribed be intended to represent his name; or a description (without any name) is sufficient if intended to identify him as a witness. * * * In fact there seems to be no distinction in these respects between the word 'sign' and 'subscribe.' Any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness." Id. *85, *86.

An examination of the cases bearing upon the interpretation of the English statute shows that the text of the learned author is fully supported.

The reasoning by which the conclusions are reached may be thus summarized:

To "subscribe" is to attest or give consent or evidence knowledge by underwriting, usually (but not necessarily) the name of the sub-

scriber. But the place of the writing is immaterial, since a still more general meaning of the word "subscribe" is to attest by writing, in which definition the locality is wholly disregarded. This is the reasoning of the leading English case of Roberts v. Phillips, 4 El. & Bl. 450.

To "sign," in the primary sense of the word, is to make any mark. To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, "signature" has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of "autograph," that signification is derivative, and is not inherent in the word itself, any more than it is in "autograph," which strictly conveys no more than the idea of a specimen of an individual's writing.

Any "mark" may be a signature, and that species of mark which we call a "cross" (independent of an accompanying name) was early used as a signature of assent, and indeed was designated "signum." While marksmen have become fewer with the spread of education, the mark of the cross is still recognized by statute law as a method of signing.

Therefore, as the Wills Act required only a signing by the testator, and as this requirement of signing only was also found in the statute of frauds, the courts early decided not to be bound by any narrow definition of "signing" or "signature" as meaning the writing of one's name, but to give to the word its broadest possible scope and significance, and thus held that any mark or signature made with the intent to bind the maker (in the case of the statute) or to be a sign (in the case of wills) should be deemed sufficient. As the English courts had still further obliterated from the word "subscription" the idea of place or locality, there was left no measurable distinction between the requirement upon the testator to sign and that upon the witness to subscribe.

In the decisions this broad rule is repeatedly asserted. In Goods of Clarke, 27 Law J. Prob. 18, the will of an illiterate person was executed by her mark; against which was written her maiden name instead of that properly borne by her in marriage. Says the court: "There is enough to show that the will is really that of the person whose it proposes to be. Her mark at the foot or end of it is a sufficient execution, and what somebody else wrote against the mark cannot vitiate it."

In Goods of Clark, 2 Curt, Ecc. 329, the testator had made his mark, and requested the vicar to sign for him, which he did with his own name, and not that of the deceased. Says the court: "The statute allows a will to be signed for the testator by another person, and does not say that the signature must be in the testator's name. Here this gentleman, at the testator's request, signed the will for him; not in

the testator's name, but using his own name. I incline to think this is a sufficient compliance with the act."

In Goods of Bryce, Id. 325, the testatrix signed her will by a mark, her name nowhere appearing. Says the court: "Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed. The statute does not say that the name of the testator shall appear at the foot of the will. The paper is identified as being the will of the deceased. * * * I am of opinion that the statute is sufficiently complied with."

The foregoing cases deal with the "signing" by the testator. Coming to the subscribing by the witness, it is said in Goods of Eynon, L. R. 3 Prob. & Div. 92: "No particular form of attestation is necessary, but the act done by the witness must be intended by him to evidence his attestation of the will. I must find that I can draw an inference from what occurred that the witness made a mark of some kind, with the intention to evidence his attestation."

In Goods of Christian, 2 Rob. Ecc. 110, it is said: "The attesting witnesses to the so-called 'codicil' have affixed their initials only. However, I have no doubt in the matter, although I believe this is the first instance under the act of the witnesses so signing. I am not aware that the witnesses can be required to sign their names. I am of opinion that there is a sufficient subscription on their parts, and therefore I decree probate as prayed."

In Goods of Olliver, 2 Spinks, 57, it is said: "The statute says the witnesses 'shall attest and subscribe the will.' It does not say 'shall write their own names,' so that a mark is held to be a good subscription."

These cases are quoted that there may be no room for misunderstanding of the English decisions or of the text of the book writers. But, as the matter is wholly statutory, they have no value as authority unless there be an identity in the statutory requirements of this state and England. But there is no such identity. Indeed, our statute seems to have been drawn with the express intent to foreclose and shut out the interpretation given to the English law. Thus the English statute requires subscription. That word had been judicially declared not to have reference to the place of writing. Our statute says that the will shall be subscribed at the end thereof, thus expressly making locality of writing an element of the subscription.

The English statute required a signing. As interpreted by the court, this did not necessitate the signing of the name. By express language our statute commands that a witness shall sign his name. In England, therefore, a witness may sign in any one of a multitude of ways; by our law his signing is limited to the expression of his name.

The case of Meehan v. Rourke, 2 Bradf. Sur. (N. Y.) 385, is in no way opposed to, but rather is in full accord with, this view. The

statute of New York, from which ours was taken, likewise requires that the witnesses should sign their names. Eliza Green, one of the witnesses to the will under consideration, was unable to write. Her name was correctly written by the doctor, and she then made her mark across it, and acknowledged it to be her mark and signature. The court said that before the Revised Statutes a witness might attest a will by a mark; as in this state it may be done under section 14 of the Civil Code. The opinion declares: "Our statute requires the witness to 'sign his name.' * * * Where another person writes the name of the witness, and then the witness acknowledges the signature, —puts his mark to it, his signum,—he literally signs; and what he signs is his name,—i. e. he signs his name,—while a mark alone [the learned judge significantly adds] would not be sufficient." Yet a mark alone is held sufficient under the English statute.

I conclude, therefore, that as our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way—that is to say, by affixing their names. It cannot be said that some other mode of subscription will answer the purpose, or subserve the statutory requirement, when in truth it does not. As well could it be said that the requirement of two attesting witnesses is not mandatory, and that this will, having been duly attested by one witness, should be admitted to probate.

That the overthrowing of any will works a hardship upon the devisees and legatees is obvious; but the law is no more tender of their claims than it is of the rights of the natural heirs. When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; TEMPLE, J.

GAROUTTE, J.[45] I dissent. I do not think a man's testamentary disposition of his property should be defeated for the reasons here given. The argument requires a too technical analysis of terms and statutes in order to arrive at such a result. While the right to dispose of property by will is purely statutory, still it can hardly be said to be a mere matter of legislative grace, for it has become almost an inalienable right, made so by reason of its long practice and approval in all civilized nations. It is conceded that, if the testator, Walker, had made a like mistake, and signed his name "Warren," it would not have defeated the will; but it is now held that, the witness Warren having made the mistake in signing his name "Walker," the will is avoided. I have no idea that the legislature, in formulating the statute as to the character of the signatures, ever intended such results to follow;

[45] The dissenting opinions of McFarland and Van Fleet, JJ., are omitted.

and I am satisfied it never intended to attach any different meaning to the two phrases, namely, "sign his name as a witness," and "subscribed by the testator," or that the legislature ever intended to bar a man from being a witness to a will who was unable to sign his name, any more than it intended to bar a man from making his will who was likewise so unfortunate.

For the purposes of this statute the person's mark, properly witnessed, is his name; and any name that the party should attach to the will as a witness is his name. It is not for a contestant of the will to say to a witness, "That is not your name;" and neither is it for the witness to appear upon the stand and say, "That is not my name." If we are to be so technical in this matter, the statute should have said "true name." The true names of witnesses are often unknown to the testator, and to say that a person could intentionally and corruptly sign a false name to a will as a witness, and thereby defeat it, is to go to great lengths. No case in the books has ever gone that far, to my knowledge. Still that doctrine would seem to be declared by the main opinion of the court in the present case. A name signed by mistake of the witness is no different from one signed in fraud. The knave wrote the name as his name, and for the purposes intended by the testator it was his name. In the present case the attorney, as a witness, unintentionally wrote a name which was not his true name, but he intended the writing to be his name, and he made the writing for his name, and for the purposes intended by the testator; and as to those purposes it should be held to be his name. If, one hour previous to the signing of the will, he had concluded to change his name to C. G. Walker, and had so signed it, or, for the very purpose of concealing his true name, had signed the will "John Brown," to my mind the will would be legally witnessed; and in the present case the same conclusion should be declared.[46]

In re STRONG'S WILL.

(Surrogate's Court, Westchester County, 1891. 16 N. Y. Supp. 104.)

Proceeding by Edward Strong, as executor, for the probate of a paper purporting to be the last will of Eliza Strong, deceased. The alleged will was duly signed and acknowledged by testatrix in the presence of Darius A. Secor and Sarah Secor, his wife, both of whom testatrix then requested to sign the will as witnesses. Mr. Secor, in the presence of testatrix, signed his own name, and, at the request of Mrs. Secor, who was incapacitated from writing by reason of a felon on her right hand, signed her name also. After the death of

[46] On signing by mark, see 114 Am. St. Rep. 222, note; 4 Am. & Eng. Ann. Cas. 637, note.

testatrix Mrs. Secor caused her name as written by her husband to be erased, and she then signed her name in place thereof.

COFFIN, S. The question as to whether the alleged will was sufficiently executed according to the requirements of our statutes on the subject, inasmuch as the names of both witnesses were written solely by one of them, is alone presented for adjudication. In this respect it will be seen that, while the statute requires that the will shall be "subscribed" by the testator at the end of the will, it also provides that "there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator." 4 Rev. St. (8th Ed.) p. 2547, § 40, subd. 4. Thus there is a change from the word "subscribed," as applied to the act of the testator, to the words "sign his name," as applied to the act required of the witnesses. Whether it was intended by the legislature to treat the words "subscribe" and "sign" as synonymous is fairly open to question. If it did not so intend, why did it not use the same word in each instance?

The word "subscribe," according to the best lexicographers, is to write underneath, while "sign" is defined to affix a signature to. And it was held in the English courts that the word "sign," as used in the statute of frauds, was sufficiently complied with if the party wrote his name on the paper in any place, so that if even he commenced by writing, "I, John Jones," and wrote his name in no other place, it was held a sufficient signing within the statute; but the word "subscribe" clearly means a writing at the end or foot. And, while they have given a very liberal, if not loose, construction of the word "sign," in so far as the statute of frauds affecting contracts was concerned, yet in the case of wills, where the witnesses are required to subscribe as such, they exacted some physical act to be done by the witnesses, either by writing their own names or making their marks. Moore v. King, 3 Curt. Ecc. 243; 1 Jarm. Wills (Rand. & T. Ed.) 215. But that statute expressly permitted the signature of the testator to a will to be made by some other person in his presence and by his direction. 1 Rev. Laws, p. 364, allowed the same thing. Under these statutes it was held that the signature of the testator or of the witnesses by making a mark was sufficient. Baker v. Dening, 8 Adol. & E. 94; Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330. Many other and more recent cases establish the same principle.

But the question still remains, is the name of one or each of the witnesses, written by another, a sufficient compliance with the requirement of the statute? In Goods of John White, 2 Notes Cas. Adm. & Ecc. 461, it appeared that a husband, a witness, signed not only his own name, but also that of his wife, the other witness. There was no evidence that the wife had, in fact, become a party to the subscription, and the execution was held to be insufficient. Here, however, the wife was present as a witness, and, because of her temporary disability to write her name, requested her husband to write it for

her, which he did. All this occurred at the time of the execution of the will by the testatrix and in her presence, and although the latter did not also request the husband to write the wife's name, yet by her silence she sanctioned the act.

Surrogate Bradford, eminent for learning and industry, seems to have inclined to the opinion that an attesting witness must take some physical part in the act of signing, in order to a compliance with the statutory requirement of signing his name. Campbell v. Logan, 2 Bradf. Sur. 90–97; Meehan v. Rourke, Id. 385–392. This is probably in accord with the tenor of English decisions on the subject, with some few exceptions.

But while the precise question has not, so far as known, been determined by the courts of this state, yet in some of our sister states a subscription by a witness in the manner it was done in this instance has been held sufficient. In Massachusetts, in the case of Chase v. Kittredge, 11 Allen, 49–59, 87 Am. Dec. 687, Gray, J., says: "A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with the statute, but, not being in the handwriting of the witness, would create no presumption of a lawful execution and attestation, without affirmative evidence that it was so made." Here we have such affirmative evidence. See, also, Horton v. Johnson, 18 Ga. 396.

In Upchurch v. Upchurch, 16 B. Mon. (Ky.) 102, and in Jesse v. Parker, 6 Grat. (Va.) 57, 52 Am. Dec. 102, it was expressly held that such a signing of the witness' name as occurred in this instance was a sufficient execution under a similar statute. In the latter case we have presented the singular fact of a will being sustained where the body of the will, the name of the testator, and of the three witnesses required in that state, were all in the handwriting of one person. As was well said in that case: "Where the attestation is by mark, the validity of such an attestation does not depend upon the fact of the witness making his mark, or doing some manual act in connection with the signature, but upon the signing of the name of the witness by his authority."

The maxim, qui facit per alium facit per se, has, doubtless, its limitations; but it is difficult to discover why it is not applicable here. The frauds in the execution of wills which the statute was designed to guard against will in no way be facilitated by the sanctioning of this mode of execution. Still, where we consider that the art of writing is so common that there can be little trouble in finding witnesses who can write their names, it is desirable that wills should be witnessed by such persons, especially in view of the fact that should they make their mark, or sign by the hand of another, and they should predecease the testator, there would be no possibility of proving their handwriting, and then the will could not be admitted to probate, unless other persons should chance to be present who could testify to

the facts; for the statute provides that, in case the witnesses be dead, the will may be established by proof of the handwriting of the testator and of the subscribing witnesses. Code, § 2620.

At first my impression was that the execution of this will was insufficient, but a further examination of authorities and subsequent reflection have led to a different conclusion. It is therefore held to be a valid will, in so far as its execution is concerned.[47]

RILEY v. RILEY.

(Supreme Court of Alabama, 1860. 36 Ala. 496.)

R. W. WALKER, J.[48] * * * 3. The statute requires the will to be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator." Code, § 1611. The questions we are called upon to decide are whether the signature of the witness may be made by another person for him, and, if so, whether one witness can subscribe for another witness, who is himself well able to write. While the statute provides that the will may be signed by "the testator, or some person in his presence, and by his direction," the provision in respect to the attesting witnesses is that they "must subscribe their names thereto in the presence of the testator." There is certainly much force in the suggestion that the express allowance of the alternative in one case, with the absence of such allowance in the other, raises a strong inference that the legislature meant to require the actual, personal signature of each witness. * * *

Without now saying whether an actual physical participation of the witness in the act of signing is, in all cases, essential to a valid subscription of his name, we are not willing to go so far as to hold, that one subscribing witness may sign for another, who is himself well able to write, and who does not in any way join in the physical

[47] "The trial proceeded very largely upon the assumption that it was necessary for Goodman personally to sign his name as a subscribing witness. If the signature had, in fact, been made by Etz (the other subscribing witness) at the direction of Goodman and in his presence, with the usual request and declaration of the testator, that would be a sufficient compliance with the statute. A subscribing witness may sign by mark or by another person, the same as the testator himself." Spring, J., in Mock v. Garson, 84 App. Div. 65, 69, 82 N. Y. Supp. 310, 313 (1903). See Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565 (1876); Smythe v. Irick, 46 S. C. 299, 24 S. E. 69, 32 L. R. A. 77, 57 Am. St. Rep. 684 (1895); Schnee v. Schnee, 61 Kan. 643, 60 Pac. 738 (1900). Compare In re Will of Elijah Pope, 139 N. C. 484, 52 S. E. 235, 7 L. R. A. (N. S.) 1193, 111 Am. St. Rep. 813 (1905), where the witness held the end of the pen while her name was being written.

But see Riley v. Riley, next post; In re Losee's Will, 13 Misc. Rep. 298, 34 N. Y. Supp. 1120 (1895); McFarland v. Bush, 94 Tenn. 538, 29 S. W. 899, 27 L. R. A. 662, 45 Am. St. Rep. 760 (1895) contra. For other cases, see 4 Am. & Eng. Ann. Cas. 637, note.

[48] Part only of the opinion is given. For the statement of facts and the first part of the opinion, see report of the case, ante, p. 119.

act of subscription. Whatever may be the rule in reference to witnesses who are not able to write, we think that, where a witness is himself well able to write, the subscription of his name by another subscribing witness ought not to be deemed a compliance with the statute.

The evidence set out in the record shows that the will was written and signed for the testator by one Robbins, who subscribed his own name as a witness, and also the name of the other witness; the latter not partaking, otherwise than by a simple assent, in the act of signature, although she "could read and write very well; perhaps, better than Robbins himself." To hold that these facts amounted to a valid execution and attestation of the will would certainly weaken the safeguards against frauds and forgeries, which it was the purpose of the statute to provide. It is manifest that the signatures of the witnesses, written by themselves, furnish a reliable foundation for those legal presumptions in favor of the due execution of a will, which arise upon proof of the handwriting of the witnesses, when they are dead or out of the state. We think we consult sound public policy in deciding that one of the subscribing witnesses to a will cannot sign the name of another who is himself well able to write, and who does not physically participate in the act of signing.

Decree reversed, and cause remanded.

BURTON v. BROWN.

(Supreme Court of Mississippi, 1898. 25 South. 61.)

On the 11th day of September, 1896, George Washington died, leaving a will, by which he attempted to convey certain property to his wife, Lou. This will was signed as follows: "George Washington, per Rev. H. M. Mingo, Sr. Witness: Rev. Thomas Morgan." Lou, the widow of testator, has since intermarried with one Burton, and in April, 1898, filed her petition for the probate of said will, together with the affidavits of H. M. Mingo, Sr., and Thomas Morgan, to prove and establish the same. The clerk in vacation admitted the will to probate and record. In May, 1898, appellee, Amanda Brown, filed her petition to the court, alleging that she was the daughter of George Washington, deceased, and praying that the probate of said will be set aside, on the ground, among others, that said instrument was not witnessed as wills are required to be by law. This petition was granted by the court, and the probate of said will was set aside, and appellant's petition for probate dismissed. From this decree an appeal was prosecuted.

WOODS, C. J. There is but one subscribing witness to the instrument propounded as the will of George Washington. The name of the Reverend H. M. Mingo appears only where he signed the name

of the deceased, viz., "George Washington, per Rev. H. M. Mingo." A mere inspection of the paper demonstrates that he did not sign as a subscribing witness, but only as the amanuensis of Washington in his signing his (Washington's) name to the instrument. As our statute requires the attestation of two subscribing witnesses to every will, the learned court below properly disallowed the clerk's action in vacation in admitting to probate the will which was subscribed by only one witness. Affirmed.[49]

In re ROBERTSON'S ESTATE.

HOLYOKE v. SIPP et al.

(Supreme Court of Nebraska, 1906. 77 Neb. 394, 109 N. W. 506.)

DUFFIE, C.[50] E. L. Holyoke, the executor named in a paper purporting to be the last will and testament of William Robertson, has appealed from an order of the district court of Lancaster county refusing to admit the will to probate. John Krumack and W. J. Adamson were the subscribing witnesses. The testator and subscribing witnesses were employed in the freighthouse of the B. & M. R. R. Co. at Lincoln. The witnesses testified that Robertson brought the paper to them there, and requested their signatures. It does not appear that the witnesses were employed in the same room, and neither can testify that they subscribed their names in each other's presence.

This, under our statute, is immaterial. Dewey v. Dewey, 1 Metc. 349, 35 Am. Dec. 367; Jarman on Wills, vol. 1, p. 209. Their testimony is also lacking in certainty as to whether the testator declared that the paper on which he desired their signatures was his last will and testament, but we are satisfied that from previous conversations with him both the witnesses understood that it was his last will and testament, and that they were requested to attest it as such. This we think not fatal in view of the attestation clause attached, and the same may be said of the failure of the witnesses to remember with certainty whether the will was signed by the testator when the same was signed and attested by them. The attestation clause attached to the will is in the following language: "Signed and acknowledged by the above testator in the presence of us present and in the presence of each other subscribe our names this 21st day of April, 1900, A. D. at Lincoln, Neb., U. S. A. John Krumack, Jr. William J. Adamson."

It clearly appears from the evidence that the testator wrote his own will, and this probably accounts for the fact that the attestation clause

[49] See Peake v. Jenkins, 80 Va. 293 (1885). But an official certificate may also be an attestation. Murray v. Murphy, 39 Miss. 214 (1860); Payne v. Payne, 54 Ark. 415, 16 S. W. 1 (1891). See, also, Gump v. Gowans, post, p. 196.

[50] Part of the opinion is omitted.

is not as full and formal as in general use; but it states with certainty that the will was signed by the testator in the presence of the witnesses, and acknowledged by him, and that their names were subscribed in his presence. These are the essential requirements under our statute to the making of a valid will. See section 4992, Cobbey's Ann. St. 1903. * * *

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the case remanded for further proceedings.[51]

SECTION 8.—COMPETENCY OF WITNESSES

STATUTORY PROVISIONS.

And, in one case determined by the court of King's Bench (Holdfast d. Anstey v. Dowsing, 2 Str. 1253 [1746]) the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney, whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the

[51] See Manners v. Manners, ante, p. 145; In re Beggans' Will, ante, p. 148; In re Sezer's Will, 129 App. Div. 7, 113 N. Y. Supp. 210 (1908). On the necessity of an attestation clause, see 14 L. R. A. (N. S.) 255, note; 11 Am. & Eng. Ann. Cas. 428, note; 114 Am. St. Rep. 238, note. On the effect of an unsigned attestation clause to a holographic will, see 104 Am. St. Rep. 32, note.

"It is not indispensable that the witness shall sign a formal clause of attestation. The attestation clause may consist of a simple word, such as 'witness,' 'attest,' or 'test,' or there may be no words of attestation at all, and yet the signature of the witness alone constitutes an attestation of every fact necessary to make the will valid." Cartwright, C. J., in Calkins v. Calkins, 216 Ill. 458, 463, 75 N. E. 182, 183, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233 (1905). That the attesting clause is defective in form is unimportant. Barricklow v. Stewart, 163 Ind. 438, 72 N. E. 128 (1904).

"The authorities all hold that the attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected with that sheet." Brown, J., in In re Baldwin's Will, 146 N. C. 25, 30, 59 S. E. 163, 165, 125 Am. St. Rep. 466 (1907). That the subscription may be in the space left for the names of the executors, no executors being named, is held in Goods of Ellison, [1907] 2 Ir. R. 315.

persons most likely to be present in the testator's last illness), and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II, c. 6 [1752], which restored both the competency and the credit of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a much later case (Windham v. Chetwynd, 1 Burr. 414 [1757]) the testimony of three witnesses who were creditors was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient.

2 Bl. Com. *377.

WILLS ACT.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account

of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

7 Wm. IV & 1 Vict. c. 26, §§ XIV–XVII (1837).

SPARHAWK v. SPARHAWK.

(Supreme Judicial Court of Massachusetts, 1865. 10 Allen, 155.)

Appeal from a decree of the judge of probate, disallowing an instrument offered for probate as the will of Catherine S. Cole.

It was agreed that Mrs. Cole, at the times of the execution of this instrument and of her death, had no father, mother, husband or children living; that she died possessed of considerable property; that Edward Sparhawk, one of the three attesting witnesses, was her brother and an heir at law, and that the instrument contained no devise or bequest to him, but gave nearly all the property to his son. The question whether he was a competent attesting witness was reserved by Gray, J., for the determination of the whole court.

BIGELOW, C. J. The provisions of Gen. St. c. 131, §§ 13, 14, abolishing the disqualification of witnesses on the ground of infamy and interest, and permitting parties to the record in all civil actions and proceedings to testify, do not apply to attesting witnesses to wills or codicils. By section 15 these are specially excepted from the operation of the two preceding sections. We must therefore have recourse to the well-settled rules of the common law, as they existed prior to the enactment of the above-cited provisions, in order to determine whether a witness to a will is competent as a subscribing witness at the time of the attestation of the instrument and its execution by the testator. It is to be borne in mind that the question to be determined in this case is not whether the witness objected to at the trial was competent to give evidence in the case, but whether he was competent according to the rules of the common law to act as a subscribing witness. If he was, then the will was duly attested; but if he was not, then the will cannot be admitted to probate, because it was not subscribed in the presence of the testator by three competent witnesses.

The much-vexed question as to the true construction of the words "credible witnesses" in the English statute of wills was early settled by this court, in Amory v. Fellowes, 5 Mass. 219, 229, in which it was held that the word "credible" was used as equivalent to "competent," and that a witness was admissible to prove the execution of a will "whom the law will trust to testify to a jury." This construction was confirmed by several subsequent decisions (Sears v. Dillingham, 12 Mass. 358, 361; Hawes v. Humphrey, 9 Pick. 350, 356, 20 Am. Dec. 481; Haven v. Hilliard, 23 Pick. 10, 17), and was incorporated into Rev. St. c. 62, § 6, by changing the phrase "credible witnesses" into

"competent witnesses" (Rep. of Com. on Rev. St. c. 62, § 4). The same phraseology is contained in Gen. St. c. 92, § 6.

There can be no doubt that these words have a "peculiar and appropriate meaning in the law," and that in interpreting them it is our duty to give them that meaning. This is the rule of exposition prescribed in Rev. St. c. 2, § 6, and Gen. St. c. 3, § 7. A competent witness, according to legal intendment, is one who is entitled to be examined in a court of justice, and of whose credibility the court and jury are by the well-settled rules of law permitted to judge. He must be so situated, in respect to the issue depending between the parties to a cause or proceeding, or to the particular fact concerning which he is called to testify, and must have such sense of the obligation of an oath, as to come within the class of persons whom the common law deems it safe and wise to admit to give testimony in judicial investigations. In general, if a witness is not wanting in religious belief, if he has not been rendered infamous by conviction of crime, and has no pecuniary interest in the event of the suit in which he is called to testify, he is admissible and competent as a witness.

There are no other tests by which, under the rules of the common law, a court can determine whether a witness is to be excluded or admitted, and, so far as we know, no other have ever been applied in any of the cases which have arisen under the statute regulating the attestation of wills. Certainly, in all of those which have heretofore been decided by this court, the struggle has been whether the witness had at the time of attestation such pecuniary interest in the event of the suit as to be then disqualified as a witness to testify concerning the signing of the will by the testator, according to the established rule of evidence at common law, as recognized and acted on in courts of justice.

Applying this rule to the facts agreed in the present case concerning the situation and relation of the attesting witness, we are unable to see any valid ground of objection to his competency. It is conceded that he was one of the heirs at law of the testatrix, and, if she had died intestate, he would have been entitled to one fourth part of her estate. It is also agreed that by her last will the testatrix devised and bequeathed the larger part of her estate to the son of the attesting witness, and made no devise or bequest whatever to the latter. It is very clear, therefore, that the pecuniary interest of the witness would be promoted by a failure to prove the due attestation of the will, and that his testimony in support of it would operate directly against this interest.

It is contended, however, that the fact that he was the heir at law of the testatrix, and in the event of intestacy that he would be entitled to a distributive share of the estate of his sister, gave him an interest in the subject-matter. In a certain sense this is true. He had an interest in the question whether his sister should die testate or intestate, because on this contingency depended his own claim to

share in her estate. But the insuperable difficulty in the way of holding this fact to be a disqualification of him as a witness is that by the rule of law interest of itself, without regard to its nature or bearing on the issue, never operated to exclude a witness from giving evidence. It is only when the pecuniary interest of a person will in some way and to some appreciable extent be aided or promoted by a judgment or decree in favor of the party calling him, that he is excluded from testifying, according to the rule of the common law. So plain is this, that it is said by Professor Greenleaf in 1 Greenl. Ev. § 410, that "it is hardly necessary to observe, that when a witness is produced to testify against his interest, the rule that interest disqualifies does not apply, and the witness is competent." Nor is this all. Not only does such an interest not disqualify a witness, but it is always deemed to be a circumstance legitimately entitled to great weight in judging of the credibility of a witness, that he is called to testify adversely to his own interest.

This rule of the common law which excludes a witness from giving evidence in favor of his own interest is said to be founded on the close and intimate connection which experience has shown to exist between the situation of a witness and the truth or falsity of his testimony. The common law rejected the evidence of persons called to testify in support of their interest, not because persons so situated might not sometimes state the truth, but because a long acquaintance with and familiar knowledge of proceedings in courts had shown that men were subject to be greatly swayed and influenced in their testimony by having a private pecuniary interest in the favorable result of a cause which they were called to support by their evidence; and that, if allowed to give testimony in such cases, it would tend to the commission of perjury, and to mislead rather than to guide juries in the investigation of truth. It is obvious that the reason on which the rule is founded has no application where the testimony which a witness is called to give will operate to the prejudice of his rights or interest, or in no way tend to promote them.

Nor can we see any greater difficulty in applying the ordinary rule of exclusion on the ground of interest to an attesting witness to a will than to one who is called to testify in the trial of an action at law. In the latter case the test of competency is whether the witness will gain by a decision of the case in favor of the party who offers him as a witness. It does not depend on the nature of his evidence or the facts to which he is expected to be a witness. The question is not whether he shall be permitted to give a certain kind of evidence, or to testify to particular facts and not to others, but whether he can be admitted to testify at all. So in case of the attestation of a will. The competency of the witness is to be settled by his situation at the time of attestation, with respect to the subject matter and the contents of the will.

The question is not whether he will testify in support of or adversely to the establishment of the will, but whether his situation and relation to the testator or testatrix, and the disposition of the property by the will, were such, when the will was made, that he can be admitted to testify at all. Nor is it at all material to the question of competency that the contents of the will were unknown to the witness at the time of attestation. The law does not look to the consciousness or knowledge of a party to ascertain whether he is competent to testify. It is the fact of a present existing interest which disqualifies. If this exists, the witness is incompetent; if no interest is shown, then he is competent, irrespective of his knowledge of an absence of interest in the subject matter in controversy. If, by the terms of the will, its admission to probate would operate favorably to his interests, he is incompetent to attest the execution of the instrument. He then has a direct pecuniary interest in the proof of the fact to which he is called to bear witness.

The principles of law regulating the competency of attesting witnesses to wills are correctly stated in Haven v. Hilliard, ubi supra. It is true that in giving an exposition of the provisions of a statute affecting the validity of the attestation in that case, certain illustrations were used by the court which seem to give countenance to the doctrine that a witness to the execution of a will may be incompetent even where his interest was adverse to its establishment and validity. But the case itself shows that no point concerning the competency of witnesses so situated was there raised, and that the language of the court, though liable to misapprehension, was not intended as a decision of that question. Certainly so far as it seems to support the proposition that an heir at law, who is disinherited in whole or in part by a will, is incompetent as an attesting witness, the case is contrary to well settled principles, and must be overruled.

Case to stand for trial.[52]

[52] "The statute of wills requires 'three or more credible witnesses,' and the well-settled construction of this and other similar statutes is that the witnesses should be competent, or not disqualified, at the time of the attestation of the will, to be sworn and to testify in a court of justice." Doe, J., in Carlton v. Carlton, 40 N. H. 14, 17 (1859). In that case it was held that an infant under fourteen years of age was presumptively incompetent, but that the presumption might be rebutted. A witness' subsequent incompetency will not affect the validity of the will. Wisehart v. Applegate, 172 Ind. 313, 88 N. E. 501 (1909).

"If the will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event which may happen, he has a beneficial interest under it, in contemplation of law; and if the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competency." Strout, J., in In re Trinitarian Congregational Church and Society of Castine, 91 Me. 416, 423, 40 Atl. 325, 327 (1898).

On the competency of witnesses to wills, see 77 Am. St. Rep. 459, note; 15 Am. & Eng. Ann. Cas. 889, note.

WINSLOW v. KIMBALL.

(Supreme Judicial Court of Maine, 1846. 25 Me. 493.)

WHITMAN, C. J.[53] This is an appeal from the decree of the judge of probate, for this county, approving the will of A. G. Winslow, deceased. The instrument was subscribed as usual by three attesting witnesses. But one of them was the wife of a legatee in the will. And it is insisted that this is not a case within Rev. St. c. 92, § 5, rendering bequests to subscribing witnesses void, as the wife was not a legatee; and it must be admitted that, nominally, she was not; and, upon a construction strictly literal, the ground relied upon might be tenable. But statutes are to receive such a construction as must evidently have been intended by the Legislature. To ascertain this we may look to the object in view; to the remedy intended to be afforded; and to the mischief intended to be remedied. The object in view in the provision in question clearly was to prevent wills from becoming nullities, by reason of any interest in witnesses to them, created entirely by the wills themselves. No one can doubt, if it had occurred to the Legislature that the case before us was not embraced in the enactment, that it would have been expressly included. It was a mischief of the precise kind of that which was provided against; and we think may be regarded as virtually within its category.

Accordingly, in New York, where the statutory provision, in this particular, is the same as in this state, a devise or legacy to the husband or wife, the other being a witness to the will bequeathing it, is held to be void, upon the ground, as expressed by one of the judges of the court there, "that the unity of husband and wife, in legal contemplation, is such that, if either be a witness to a will containing a devise or legacy to the other, such devise or legacy is void, within the intent of the statute," and upon the ground, that the statute concerning wills should receive a liberal construction, and one consistent with common sense. Jackson v. Woods, 1 Johns. Cas. 163; Jackson v. Durland, 2 Johns. Cas. 314.

The decree of the judge of probate is affirmed.[54]

[53] The statement of facts is omitted.

[54] The Massachusetts court refused to follow the Maine and New York cases, because it thought their construction of the statute "founded rather upon a conjecture of the unexpressed intent of the Legislature, or a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the statute by which their intent has been manifested," and accordingly, in order not to have to declare void, "not merely the interest which the wife, who was a subscribing witness, would take, by way of dower or otherwise, in the property devised to her husband, but also the whole devise to and for the benefit of the husband, who was not a subscribing witness and whose estate the statute does not assume to reach," declared the whole will void. Sullivan v. Sullivan, 106 Mass. 474, 475, 476, 8 Am. Rep. 356 (1871). See, also, Hodgman v. Kittredge, 67 N. H. 254, 32 Atl. 158, 68 Am. St. Rep. 661 (1892); Fisher v. Spence, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360 (1894), and 77 Am. St. Rep. 468, 469, note. The Maine rule was adopted in Massachusetts by St. 1878, c. 122.

In re HOLT'S WILL.

NEEDHAM et al. v. BORDEN et al.

(Supreme Court of Minnesota, 1893. 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434.)

VANDERBURGH, J.* The will in question here contains a legacy to Georgiana Needham, estimated by the testator at about $100, and it was attested by two witnesses, one of which was E. Z. Needham, who is and was at the time of such attestation the husband of Georgiana. Mrs. Needham is the proponent of the will, and in the probate court objection was made by the contestants, appellants here, to the allowance and probate of the will on the ground that the husband of the proponent E. Z. Needham was not a competent witness to the will.

The action of the probate court, allowing the will, having been affirmed by the district court, the case is brought here on appeal from the judgment of the last-named court.

1. The first question presented involves the competency of the attesting witness E. Z. Needham. Undoubtedly he must have been a competent witness at the time of the execution of the will. This is the established doctrine of the common-law authorities, from the case of Holdfast v. Dowsing, 2 Strange, 1253, down to the present time (1 Redf. Wills, 253; 2 Greenl. Ev. par. 691; Morrill v. Morrill, 53 Vt. 78, 38 Am. Rep. 659); and it is clearly recognized in our statute, (Probate Code, c. 2, § 19), which requires that a will shall be attested and subscribed in the testator's presence by two or more competent witnesses. But, if competent at the time of the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proven.

The appellants, however, contend that the attesting witnesses must be such as would be competent under the common-law rule, and that they are impliedly not included in the definition of "witness" (Gen. St. c. 73, § 6), because their competency is to be determined as of the time of the attestation, and not as of the time when they may be called to testify on the probate of the will. But this construction cannot be upheld. The cases from Massachusetts are not in point, because there the statutes removing the objection to the competency of witnesses on the ground of interest and of the relation of husband and wife are expressly declared not to apply to attesting witnesses to a will. Sullivan v. Sullivan, 106 Mass. 478, 8 Am. Rep. 356.

The question of the competency of such witnesses in this state is determined by the statute. Gen. St. c. 73, §§ 6, 7, 9, 10. An attesting witness is competent, if he be one who would at the same time be

* The statement of facts is omitted.

competent to testify in court to the facts which he attests; and so the courts hold. Thus in Jenkins v. Dawes, 115 Mass. 601, an attesting witness is declared to be one who at the time of the attestation would be competent to testify; and in Morrill v. Morrill, 53 Vt. 78, "competency to testify" must exist at the time of the attestation.

The attestation contemplated the subsequent testimony to the facts attested when the will should be proved. The incompetency of the husband or wife to testify where either was an interested party at the common law arose out of the unity of interest and of personal relations. This unity of interest may be removed, and yet, owing to the unity and confidential nature of their personal relations, the common-law rule in respect to competency remain, on grounds of public policy. Lucas v. Brooks, 18 Wall. 453, 21 L. Ed. 779; Giddings v. Turgeon, 58 Vt. 110, 4 Atl. 711.

It is conceded that the unity of interest, so far as relates to property, has been done away with by statute (Wilson v. Wilson, 43 Minn. 400, 45 N. W. 710), and the general disqualification to testify on the ground of interest is removed by Gen. St. c. 73, § 7; but it is denied that the statute has removed the general incompetency growing out of the marriage relation. But the only limitation upon the competency of either is found in section 10, which provides that neither party shall be examined without the consent of the other. They are not thereby made incompetent witnesses, nor are they to be classed as such, though their right to be examined is contingent upon the consent of that one for or against whom the witness may be offered. It does not follow that a married person is incompetent to attest a will because the husband or wife of such person is a beneficiary under the will. He can only become incompetent in a single contingency, and that is, in case such interested party shall become a contestant on the subsequent probate of the will. If the latter be not a contesting party, he is in no position to raise the objection, and he may not choose to do it if he is; and if he be one of the proponents, he thereby consents to the testimony of the attesting witnesses. The contingency which would make him incompetent may never arise, and if it does, it must be deemed to arise subsequent to the act of attestation.

In the case at bar, then, what evidence is there that the witness is incompetent? The wife is proponent, and offers to examine her husband as a witness. No question, therefore, in respect to his competency is raised. Incompetency in a witness is not presumed, and the question is to be determined when the offer to examine the witness is made, and then the facts are to be ascertained by the court. The witness is not shown to be incompetent in this case, and his evidence on the probate of the will was properly received. In Tillotson v. Prichard, 60 Vt. 107, 14 Atl. 302, 6 Am. St. Rep. 95, it is held that the wife of the grantor in a Minnesota deed was a competent attesting witness thereto, under the provisions of the statute we have been

considering, and the court say "that she was a competent witness, and might be examined with the consent of her husband," and also held, as we do, that the plaintiff, by offering the deed in evidence, consented to her being a witness.

2. The appellant also contends that if the husband be a competent witness, then the legacy to his wife should be held void under the statute which annuls beneficial devises, etc., to a subscribing witness on account of the marital relation. But there is nothing in this point. The husband has no direct or certain interest in the legacy to his wife. It is absolutely hers in her own right, and free from his control. Gen. St. c. 69; Wilson v. Wilson, supra. The only devises or legacies which the statute annuls are those made to subscribing witnesses, which clearly does not apply to the husband or wife of the legatee.

In England, where husband and wife are competent witnesses (Tayl. Ev. pp. 1145, 1147), the statute has gone further (1 Vict. c. 26, § 15), and also avoids gifts, legacies, and devises to the husband or wife of an attesting witness. It could not be done without the statute. This legislation assumes both the competency of the witnesses and that they had no interest in the legacies which would have made the same void without the aid of legislation to that effect.

The construction we have adopted is in conformity with the spirit of modern legislation on the general subject of the rights of husband and wife, and the practical results will no doubt be no more serious than in the case of parents or children, who may unquestionably attest deeds and wills for each other. 1 Alb. Law J. 246.

It is a matter largely for the judgment of the Legislature. Judgment affirmed.[55]

[55] "We think that by these rules the wife was a disinterested witness. She had no present, certain, and vested interest in the legacy given to her husband. It was remote and contingent. It will be observed that this is not a devise of real estate. The will contemplates that whatever real estate there may be shall be sold to pay the legacies. Now the wife has no present, vested interest in such a legacy to the husband. It is his own, to dispose of at his pleasure, and there are many contingencies which may intervene to prevent the wife from ever acquiring any part of it. We think the wife was a competent and disinterested witness." Rothrock, J., in Hawkins v. Hawkins, 54 Iowa, 443, 446, 6 N. W. 699, 700 (1880).

In Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305 (1895), it was held that, under a statute making the husband or wife of any party interested in a suit competent and compellable to give evidence on behalf of any party to the suit, a husband was a competent attesting witness to a will under which his wife took as devisee and legatee. For a case where the statutes leave the husband or wife of a beneficiary under a will incompetent to testify concerning matters connected with the execution of the will, and therefore incompetent attesting witnesses, see Belledin v. Gooley, 157 Ind. 49, 60 N. E. 706 (1901).

GUMP v. GOWANS et al.

(Supreme Court of Illinois, 1907. 226 Ill. 635, 80 N. E. 1086, 117 Am. St. Rep. 275.)

CARTWRIGHT, J. On November 11, 1902, Mary A. Gowans made her last will and testament, by which she devised certain tracts of land owned by her, and on the same day she signed and acknowledged five warranty deeds, in which her husband, Walter Gowans, joined, purporting to convey to the grantees named therein other tracts of land not devised by the will, reserving to herself the use, benefit, and control of the said lands during her life, and reciting in each a consideration of love and affection and $5. The will and deeds were kept by her in a candle box in her residence, and the deeds were never delivered. She died on June 11, 1905, and on June 23, 1905, Walter Gowans filed in the probate court of St. Clair county his petition for the probate of the will. A cross-petition was afterward filed, alleging that the deeds were executed as required by law in case of wills, and praying that they should be admitted to probate. The probate court admitted the will to probate, but denied probate of the other instruments, and on appeal to the circuit court a like order was made. A writ of error was sued out of this court to review the order of the circuit court.

The law does not prescribe any particular form for a will, but only requires that it shall be reduced to writing and signed and attested, in the presence of the testator or testatrix, by two or more credible witnesses. If those conditions are complied with, and the intention of the maker to dispose of his estate after death is sufficiently manifest, the instrument will be entitled to probate as a will upon the statutory proof being made. Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; Noble v. Tipton, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645. The deeds in question were retained by the maker, and did not operate as conveyances for want of delivery. The evidence indicates that they were intended to become operative after her death, and were therefore testamentary in character. They were not signed by any person with any intention of attesting the signature of the maker, but they were acknowledged before a notary public, who affixed his signature to the certificates of acknowledgment. Perhaps the certificates, which show that the maker acknowledged to the notary that she signed the instruments, would be sufficient to make him a subscribing witness, but there was no other competent witness.

An attempt was made to supply the other witness by the signature of the husband, Walter Gowans, who testified that he was present and saw his wife sign the deeds and that she saw him sign them; but he signed as a grantor, and not as a subscribing witness, or for the purpose of attesting her signature. If he had signed as an attesting witness, the act would have been of no avail. The term "credible," as

applied to subscribing witnesses of a will, means competent (Harp v. Parr, 168 Ill. 459, 48 N. E. 113), and the competency of a witness is to be tested by his status at the time of the attestation, and not at the time when the will is presented for probate. Fisher v. Spence, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360. The incompetency of husbands and wives to testify as witnesses for or against each other applies to the attestation of wills (30 Am. & Eng. Ency. of Law [2d Ed.] 605), and our statute has not removed the common-law disqualification. Chapter 51 of the Revised Statutes has relaxed the common-law rule to some extent, but section 8 provides that nothing in the act shall affect existing laws concerning the attestation of last wills and testaments.

The evidence did not show that the deeds were attested by two competent witnesses, and the judgment of the court was therefore correct. The judgment is affirmed.

Judgment affirmed.[56]

JONES v. GRIESER.

(Supreme Court of Illinois, 1909. 238 Ill. 183, 87 N. E. 295.)

HAND, J. This is an appeal from a judgment of the circuit court of De Witt county admitting to probate the last will and testament of Jeremiah Smith, deceased. It appears from the record that Jeremiah Smith died March 1, 1908; that he owned real and personal property of the value of $10,000; that he left a will, by which he gave his personal property to his sister, Matilda Jones, absolutely, and gave her the use of his real estate during her natural life, and devised the fee to her son, Marion Willis Jones. W. H. Armstrong and W. J. Sprague were named as executors of his will, and they were also the attesting witnesses to the execution of his will. The county court held said attesting witnesses, by reason of the fact that they were executors, were incompetent, and refused to admit the will to probate. On an appeal by Matilda Jones to the circuit court, that court held Armstrong and Sprague were competent witnesses and admitted the will to probate, and Nora Grieser, a child of a deceased brother of the testator, has prosecuted this appeal.

The question to be determined in this case is, Were W. H. Armstrong and W. J. Sprague rendered incompetent as witnesses to the execution of the will by reason of the fact that they were named as executors of the will? The statute provides that a will shall be attested by two credible witnesses. The word "credible," as used in the statute means "competent." In the Matter of Noble, 124 Ill. 266, 15

[56] That at common law a wife is not a competent witness to her husband's will, see, also, Pease v. Allis, 110 Mass. 157, 14 Am. Rep. 591 (1872). Compare Dickinson v. Dickinson, 61 Pa. 401 (1869).

N. E. 850. A credible witness to the execution of a will is one legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will (O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090), and the competency of an attesting witness is to be determined from the facts as they exist at the time he attests the will, and not as they exist at the time the will is offered for probate (Fisher v. Spence, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360); and a witness who for any legal reason is disqualified from giving testimony generally, or by reason of interest or other disqualifying cause is incompetent to testify in respect to the particular subject under investigation, is not a credible witness under the statute (Boyd v. McConnell, 209 Ill. 396, 70 N. E. 649). The true test of interest as to such witness is whether he will gain or lose financially as the direct result of the proceeding. Boyd v. McConnell, supra.

The authorities outside of Illinois are in conflict as to whether an executor named in a will has such an interest in the probate of the will as renders him incompetent as a witness to the execution of the will. We are of the opinion, however, that under the statute of this state an executor has such a direct financial interest in the probate of the will that he is disqualified, by reason of such interest, as a witness to the execution of the will. He clearly has an interest in the probate of the will to the extent of his commissions as executor. An executor, also, by virtue of the statute, has conferred upon him certain duties, which are accompanied by corresponding rights, prior to the time the will is admitted to probate, such as to cause the will to be presented for probate, to bury the deceased, to pay the necessary funeral charges, and to take care of the estate. Hurd's Rev. St. 1908, c. 3, §§ 2, 4. We think, therefore, that this court is committed to the view that an executor is not a competent witness to the execution of a will which names him executor. Ferguson v. Hunter, 2 Gilman, 657; Bardell v. Brady, 172 Ill. 420, 50 N. E. 124; Sloan v. Sloan, 184 Ill. 579, 56 N. E. 952; In re Tobin, 196 Ill. 484, 63 N. E. 1021; Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19; Jones v. Abbott, 235 Ill. 220, 85 N. E. 279.

We are therefore of the opinion that Armstrong and Sprague were not competent witnesses to establish the will, unless they are rendered competent by section 8 of the wills act (Hurd's Rev. St. 1908, c. 148), which reads as follows: "If any beneficial devise, legacy or interest shall be made or given, in any will, testament or codicil, to any person subscribing such will, testament or codicil, as a witness to the execution thereof, such devise, legacy or interest shall, as to such subscribing witness, and all persons claiming under him, be null and void, unless such will, testament or codicil be otherwise duly attested by a sufficient number of witnesses exclusive of such person, according to this act; and he or she shall be compellable to appear and give testimony on the residue of such will, testament or codicil, in like manner as if no such devise or bequest had been made. But if such

witness would have been entitled to any share of the testator's estate, in case the will, testament or codicil was not established, then so much of such share shall be saved to such witness as shall not exceed the value of the said devise or bequest made to him or her as aforesaid." Hurd's Rev. St. 1908, p. 2193.

It appears from what has been said that an executor is disqualified as a witness to a will on the ground of interest. The interest which he has, however, like that of a devisee or legatee, grows out of and by virtue of the execution of the will. In the case at bar the attesting witnesses were competent to attest the execution of the will in question at the time they signed the will as attesting witnesses, except by reason of the fact that they were named as executors. By the act of attesting the will the interest which made them incompetent by reason of their being named in the will as executors made them incompetent as witnesses to its execution. Such would be the case with a devisee or legatee who attests a will. The section of the statute above referred to was passed solely with a view to prevent the destruction of a will which would otherwise be a valid will except that the will, as executed, contained some provision which made its establishment according to the forms of law necessary by the calling of witnesses who took some interest under the will. If the incompetency of the witnesses existed outside of the fact that the will gave them a beneficial interest in the testator's estate, section 8 of the wills act does not remove the incompetency of the witnesses to the will. If, however, the incompetency of the witness arises by the act of attesting a will which gives the witness some interest in the testator's estate, the statute does apply, and under that section of the statute, while the witness cannot take under the will, nevertheless he may be called and the will established by his evidence.

The statute uses the words "devise, legacy or interest." The word "interest," therefore, must be given some force and effect, and, as applied to a case like this, it clearly designates the interest created in the attesting witness by his being named as executor in the will; that is, the interest which the witness receives as executor. The courts, in construing a statute, should give force and effect to all the language of the statute. Decker v. Hughes, 68 Ill. 33. A case may fall within the letter of a statute and not within its spirit, and it may fall within the spirit and not within the letter of a statute. No valid reason can be suggested why a devisee or legatee who signs as a witness to a will, and who may take an interest in the estate of great value to him under the will, should be compelled to appear and give evidence on the application for the probate of the will and thereby lose his legacy or devise, while an executor who only received a few dollars by way of commissions, cannot be required to give evidence in support of a will because of his interest. In construing said section 8, therefore, the word "interest" cannot be disregarded, and we are

of the opinion it was inserted in said section of the statute with a view to cover a right created by a will other than that which might properly be designated as a devise or legacy, and may be fairly held to cover such a contingent and uncertain interest as that which would accrue to an executor by virtue of his appointment.

We are of the opinion, therefore, that an executor named in a will who has signed the will as an attesting witness clearly falls within the spirit of said section 8 of the statute, and that such executor may be required to appear and give evidence in support of the execution of the will. The establishment of a will by the testimony of an executor will, however, have the effect, under the last clause of said section, to bar him from acting as executor of the will or from participating in the administration of the estate of the testator as administrator with will annexed or otherwise.

The circuit court did not err in holding that W. H. Armstrong and W. J. Sprague were competent witnesses by whom to establish the execution of the will of Jeremiah Smith, deceased. The judgment of the circuit court will be affirmed.

Judgment affirmed.[57]

[57] In Noble v. Burnett, 10 Rich. Law (S. C.) 505 (1857), it was held that an executor witness loses commissions; but whether he loses the office of executor as well was not decided. In Fearn v. Postlethwaite, 240 Ill. 626, at page 630, 88 N. E. 1057, at page 1058 (1909), the court stated that in Jones v. Grieser, supra, the court "held that the executor could be required to appear and give evidence in support of the execution of the will, but that the establishment of the will by the evidence of the executor would debar him from acting as executor or in any way participating in the administration of the estate."

That an executor is an incompetent witness, see Taylor v. Taylor, 1 Rich. Law (S. C.) 531 (1845); Workman v. Dominick, 3 Strob. (S. C.) 589 (1849); Morton v. Ingram, 33 N. C. 368 (1850); Gunter v. Gunter, 48 N. C. 441 (1856). Where the executor is not also a legatee or devisee, the weight of authority is, however, the other way. See cases cited in 77 Am. St. Rep. 466, note, and 15 Am. & Eng. Ann. Cas. 789, note, and also Hiatt v. McColley, 171 Ind 91, 85 N. E. 772 (1908); Wisehart v. Applegate, 172 Ind. 313, 88 N. E. 501 (1909); Geraghty v. Kilroy, 103 Minn. 286, 114 N. W. 838 (1908).

In In re Kessler's Estate, 221 Pa. 314, 70 Atl. 770, 128 Am. St. Rep. 741 (1908), a witness who was one of the executors under the will, who was a trustee and an officer in a church to which part of the income and ultimately part of the corpus of the trust estate was to go, and who had various options and rights regarding the trust property, was held not to be a disinterested witness, though the fact that he was executor would not alone have disqualified him. On the effect of the witness' interest in the institution beneficiary, see 15 Am. & Eng. Ann. Cas. 794, note.

"If the question were new, we see no good reason why the executor is not a credible or competent witness to a will under which he takes no interest, but is named as executor. It is at the time altogether contingent and uncertain whether he will ever be called upon to perform the duty of executor. He may die before the testator. The testator may revoke the will, or make a new one and appoint another executor. But, if it be regarded as settled at the time that he is to be executor, the only interest he can be said to acquire is to perform a service, for which he is to receive a bare compensation, just in proportion to the service performed. This can hardly be regarded as a legal interest, by any rule that has ever been recognized in the law. If a fixed per cent. were given by law, irrespective of the ac-

O'BRIEN v. SPALDING.

(Supreme Court of Georgia, 1897. 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.)

FISH, J.[58] Complaint is made that, on the trial of the present case, Mr. King was introduced as a witness in behalf of the propounder of the paper offered for probate, and was allowed, over objection, to testify concerning its execution by Mrs. Flynn, as to her mental capacity to make a will, and as to what passed between them when he read over to her and explained the meaning of the instrument he had prepared for her to sign. It is contended by counsel for the plaintiffs in error that, as Mr. King sustained toward the testatrix the attitude of attorney and confidential adviser, he was an incompetent witness to testify concerning any facts or circumstances, knowledge of which he had gained while attending to his professional duties in the premises.

We do not, however, understand the law to be that the plaintiffs are at liberty to urge this objection. The purpose of the common-law rule declaring that communications between attorney and client are privileged is to protect the client. Greenough v. Gaskell, 1 Mylne & K. 98, 103. Strangers are not at liberty to invoke this rule in their behalf. Accordingly, it was early decided in England that: "In a suit by next of kin of a testator, challenging a residuary gift made by his will to the executors, on the ground that it was made on a secret trust for an illegal purpose, * * * communications had between the testator and the solicitor employed by him to prepare the will, with reference to the will and the trusts thereof, were not privi-

tual services performed, it would be quite a different case." Poland, C. J. in Richardson v. Richardson, 35 Vt. 238, 242 (1862).

Where an executor is a competent witness, his wife, of course, is competent. Stewart v. Harriman, 56 N. H. 25, 22 Am. Rep. 408 (1875); Piper v. Moulton, 72 Me. 155 (1881); Will of Lyon, 96 Wis. 339, 71 N. W. 362, 65 Am. St. Rep. 52 (1897). And where he is not competent it is held in some jurisdictions that she is not. Fearn v. Postlethwaite, 240 Ill. 626, 88 N. E. 1057 (1909). In that Illinois case the whole will was held void where she was a witness, whereas if he had been a witness the rule of Jones v. Grieser, supra, would have applied. That unfortunate result was reached because the Illinois court refuses to follow Winslow v. Kimball, ante, p. 192. See Fisher v. Spence, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 360 (1894).

That a witness who is a beneficiary under a secret trust may still take under the trust is held in O'Brien v. Condon [1905] 1 Irish R. 51. But see In re Fleetwood, 15 Ch. D. 594, contra. The reason why the beneficiary of the secret trust may take is because he does not take under the will, but under the decree of equity. O'Brien v. Condon, supra. The same reason makes the devisee who takes subject to a secret oral trust unable to take, even as trustee, if he is a necessary witness to the will, and that whether the trust is enforceable or unenforceable; for he alone takes under the will. Moran v. Moran, 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443 (1897). But that a trustee under a trust expressed in the will may be a competent witness, see Key v. Weathersbee, 43 S. C. 414, 21 S. E. 324, 49 Am. St. Rep. 846 (1895).

[58] The statement of facts is omitted, and part only of the opinion is given.

leged." Russell v. Jackson, 8 Eng. L. & Eq. 89, 15 Jur. 1117, 9 Hare, 387.

The correctness of this position has received the unqualified recognition of the Supreme Court of the United States. Blackburn v. Crawford, 3 Wall. 176, 18 L. Ed. 186. Indeed, the doctrine laid down by the English courts appears to have become the firmly established law of this country. Graham v. O'Fallon, 4 Mo. 338; Layman's Will, 40 Minn. 371, 42 N. W. 286; McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Scott v. Harris, 113 Ill. 447; Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188, 34 Am. St. Rep. 258. In the case last cited, Lathrop, J., in pronouncing the opinion of the court, said: "Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." * * *

Judgment affirmed.[59]

SECTION 9.—INCORPORATION BY REFERENCE

HANNIS v. PACKER.

(High Court of Chancery, 1752. Ambl. 556.)

Mary Meredith, being entitled to a real and personal estate, duly made her will 29th January, 1727, and devised to her sisters all the rest and residue of her real and personal estate, after payment of her debts and legacies, and made them executrixes.

The testator some time afterwards made a codicil, and gave plaintiff a legacy in the words following: "This I desire may be performed by my loving sisters, to give £200 to my cousin Edward Hannis." But this codicil was not executed in the presence of any witnesses.

The question made was, Whether the £200 legacy, given by the codicil, was a charge upon the real estate.

Lord HARDWICKE, Chancellor. When real estate is duly devised to trustees, and is well charged, by a will duly executed, with debts and legacies, debts which are contracted after making the will, or legacies given by a codicil, though not duly executed, will be a charge upon the real estate; for the real estate was well charged by the will

[59] That a testator who requests his attorney to attest the will waives the objection of privilege, see McMaster v. Scriven, cited in the principal case. On privilege of communications to attorney during the preparation of a will, see 66 Am. St. Rep. 229, note; 17 L. R. A. (N. S.) 108, note.

with the debts and legacies; and it is immaterial by what instrument they appear, provided such instrument has been proved as part of the will; and when that is done, it is sufficient to denote the trust, and that it is part of what was intended to be comprised.[60]

CARLETON ex dem. GRIFFIN v. GRIFFIN.

(Court of King's Bench, 1758. 1 Burr. 549.)

See post, p. 339, for a report of the case.

NEWTON v. SEAMAN'S FRIEND SOCIETY.

(Supreme Judicial Court of Massachusetts, 1881. 130 Mass. 91.)

GRAY, C. J.[61] If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such. Allen v. Maddock, 11 Moore, P. C. 427; Singleton v. Tomlinson, 3 App. Cas. 404; Jackson v. Babcock, 12 Johns. (N. Y.) 389; Tonnele v. Hall, 4 N. Y. 140; Chambers v. McDaniel (N. C.) 226; Beall v. Cunningham, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469; Harvy v. Chouteau, 14 Mo. 587, 55 Am. Dec. 120. * * *

In the present case, the testator by the third codicil expressly revokes that part of the will which gives directions for the payment of legacies, and orders and directs his executors to pay the legacies mentioned in his will and codicils as nearly as may be according to the directions written in a book by Melvin W. Pierce, signed by the testator and witnessed by Pierce. The book admitted to probate contains such directions, so written, signed and witnessed, specifying the property out of which each legacy is to be paid; and, with the exception of two memoranda in the margin, which were excluded from the probate, is agreed by the parties to have been in its present form at the time of the making of the third codicil. There is no doubt, therefore, of the identity of the document referred to, nor of its ex-

[60] But where the testator charges his real estate with legacies or annuities which he shall thereafter give and charge, it is not charged with such subsequent legacies or annuities unless the will giving and charging them is executed as required for a will of real estate. That is because otherwise "that is only an attempt to reserve by a will duly executed a power to charge by a will not duly executed." Rose v. Cunynghame, 12 Ves. 29, 38 (1805).

[61] The statement of facts is omitted, and part only of the opinion is given.

istence at the date of the execution of the testamentary instrument which refers to it.

The fact that the book was in the possession and control of the testator might require a close scrutiny of the evidence that it remained in the same condition as at the time of the execution of the codicil, if there were any controversy upon that point, but is otherwise immaterial. It is not necessary that every portion of a will should be verified by the signature of the testator and the attestation of the witnesses; it is sufficient that the different sheets or papers should clearly appear upon their face, or by extrinsic evidence, to have formed part of the will at the time of its execution and attestation. Ela v. Edwards, 16 Gray (Mass.) 91, 99. Marsh v. Marsh, 1 Sw. & Tr. 528.

The document in question, which was in law part of the will, having by mistake not been presented for probate with the will, the probate court had, and rightly exercised, the power to admit it to probate afterwards. Waters v. Stickney, 12 Allen (Mass.) 1, 90 Am. Dec. 122; Musser v. Curry, 3 Wash. C. C. 481, Fed. Cas. No. 9,973. Decree affirmed.[62]

FOSSELMAN v. ELDER.

(Supreme Court of Pennsylvania, 1881. 98 Pa. 159.)

STERRETT, J.[63] The facts upon which the question of law in this case arose were either admitted or established by the verdict.

In the second item of her will, dated July 18, 1878, the defendant's testatrix, made the following provision for the plaintiff, viz.: "I do will, devise and bequeath to Isabella Fosselman (who has lived with

[62] "The result of the authorities, both before and since the late act, appears to be that, when there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified." Right Hon. T. Pemberton Leigh, in Allen v. Maddock, 11 Moore, P. C. 427, 461 (1858). In In re Bresler's Estate, 155 Mich. 567, 119 N. W. 1104 (1909), the account books of testator were held incorporated into the will by reference, so as to charge against testator's daughter an advancement made to her husband.

In In the Goods of Balme, [1897] P. 261, a catalogue incorporated in a will by reference and too big to copy without too great expense was not required to be included in the probate. The bequest was of all testator's books enumerated in his library catalogue, and the catalogue was placed by the court in the custody of the college receiving the bequest.

By proper reference a testator may incorporate in his will the will of another, so as to adopt its provisions for the disposition of his own property. Nightingale v. Phillips, 29 R. I. 175, 72 Atl. 220 (1908).

On incorporation by reference in general, see 68 L. R. A. 353, note; 107 Am. St. Rep. 72, note; 1 Am. & Eng. Ann. Cas. 395, note; 4 Prob. Rep. Ann. 444, note; 13 Prob. Rep. Ann. 111, note.

[63] The statement of facts and the opinion of the trial judge are omitted.

me many years), the house and lot wherein I now live, together with all the furniture and personal property that may be therein at the time of my decease; by furniture and personal property I mean everything I may have at my decease, except notes and bonds, and evidences of debt, and also one thousand dollars in cash, to be paid to her as soon as practicable after my decease, provided nevertheless the legacies herein bequeathed shall be forfeited if she claims any compensation, for services rendered me, from my estate."

The testatrix having died suddenly in January, 1880, the will was duly probated a few days thereafter, and letters testamentary issued to defendant, the executor therein named. While he and the appraisers were engaged in making the inventory, a sealed envelope was found among the valuable papers of the deceased, on which the following words, addressed to the plaintiff, were indorsed, viz.: "Dear Bella, this is for you to open." The envelope was immediately handed to her, and being opened in the presence of the executor and appraisers, it was found to contain a paper, of which the following is a copy, viz.:

"Lewistown, Oct. 2, 1879.

"My wish is for you to draw this 2,000 dollars for your own use should I die sudden. Elizabeth Fosselman."

It also contained a note for $2,000, made by the trustees of the Presbyterian Church of Lewistown, dated October 2, 1879, and payable to the order of testatrix one year after date, with interest at the rate of five per cent.

After a memorandum of these papers was made by the appraisers the executor took possession of them; and the right of the plaintiff to collect the note or receive the proceeds thereof having been denied by the residuary legatees, an amicable issue was framed between her and the executor, to test her right thereto. On the trial, there was no dispute as to any of the material facts. It was conclusively proved by two witnesses that the indorsement on the envelope, and the paper of which the foregoing is a copy, were both in the handwriting of Mrs. Fosselman, and there was not the slightest evidence to cast any suspicion on the integrity of the transaction. The learned judge submitted the case to the jury, with instructions to render a verdict in favor of the plaintiff, unless they found that the said indorsement and paper were not genuine, or had been fraudulently altered; subject to the opinion of the court on the question, whether the paper of October 2, 1879, in connection with the accompanying note of same date and the indorsement on the envelope, is a testamentary disposition of the note or the proceeds thereof.

In his opinion on the reserved question, the learned judge has conclusively shown that the paper referred to is testamentary in its character, intended to take effect upon the death of Mrs. Fosselman, and clearly designated the accompanying note as the subject of the bequest. These conclusions are so fully sustained by both reason and

authority that it is unnecessary to add anything to what has been so well said, in the opinion of the court below, on that subject.

The only remaining question is whether the testatrix has sufficiently designated the plaintiff as the object of her bounty in the paper that is claimed to operate as a codicil to her will. The court below held that she had not, and accordingly entered judgment in favor of the defendant non obstante veredicto. In this we think there was error. It is true the testamentary paper of October 2, 1879, does not designate the plaintiff by name, and if we had no written evidence to show who was meant by the pronoun "you," the bequest of the note would be void for uncertainty; but it is a settled fact that the envelope is addressed to the plaintiff, and why should not that indorsement in the handwriting of the testatrix be taken as part of the testamentary disposition? It is well settled that a will may be written on several separate pieces of paper. It is not even essential to its validity that the different parts should be physically united; it is sufficient if they are connected by their internal sense, or by a coherence and adaptation of parts. Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597.

It was held in Ginder v. Farnum, 10 Pa. 98, that where a will is written on several sheets of paper, fastened together by a string; proof by two witnesses of the signature of the testator at the end thereof is sufficient; and that the question whether there has been a subsequent fraudulent addition to or alteration of the instrument is for the jury, as in other cases. In the Goods of Wedge, 2 Notes of Cases, a portion of a letter was admitted to probate as the will of Jane Wedge, who, on the third page of the letter wrote, and, in the presence of two witnesses, as required by the English statute, subscribed her name to the following, viz.: "When I dey I would like you to bury me and take all I got for your treatment to me, and by somethin for your little girl." The subscribing witness testified that after the paper was signed and attested the deceased folded up the letter, and in their presence wrote the superscription it bore. In holding that the paper was clearly entitled to probate, the court said: "The letter is addressed to Mr. Henry Frost, and by 'you' the testatrix could mean no other person to be legatee than the person she addressed. I am of opinion, therefore, that the person is executor according to the tenor, and that probate should pass to him." That case is cited with approval in the Goods of Taylor, 4 Notes of Cases, 290, in which Mrs. Taylor made her will in the form of a letter, addressed on the outside to Sir George Simpson, and, after bequeathing her personal effects to her daughter, added the following: "I hereby appoint you my executor to carry this my will into effect." Administration with the paper annexed was claimed by the daughter on the ground that no executor was designated in the will; but the address on the letter was admitted to show that by "you" the testatrix meant Sir George Simpson, the person to whom the letter was addressed, and probate was accordingly decreed to him as executor.

In both these cases no envelope was used. The letters were in the form generally in use before the introduction of envelopes; but that fact cannot affect the principle. A separate paper inclosed and sealed up in an envelope is just as much a part of the letter as if the name of the person to whom it is addressed was indorsed on the paper itself. There is no room in either case to doubt that the writing inside is addressed to the person whose name is written outside; and so far as security against fraudulent alteration or substitution of one paper for another is concerned, the one is just as safe as the other before the seal is broken. Either of them is more secure than separate papers attached merely by a string, as in Ginder v. Farnum, supra.

It is also urged, as an objection to considering the address on the envelope as a part of the testamentary paper, that the former was written after the other was signed, and therefore the letter should not be considered as having been signed at the end thereof, as the statute requires; but the objection is without merit. It assumes what may or what may not have been the fact. It is not an uncommon thing for persons to indorse the address before writing the letter; but if it were shown affirmatively that the address on the envelope was written last in order of time, it would be unimportant. The natural order of reading ought to control, and that is the name of the party addressed first, and then what is written to or concerning him. If the signature of the writer is appended to what is written it fully meets the requirements of the statute.

Without pursuing the subject further we are of opinion that the inscription on the envelope should be read as the preface to and in connection with the paper inclosed therein, and that they together constitute a valid testamentary disposition of the accompanying note, operating as a codicil to the will of the testatrix.

Judgment reversed, and judgment is now entered in favor of the plaintiff on the question of law reserved.[64]

In re GOODS OF TRURO.

(Court of Probate, 1866. L. R. 1 P. & D. 201.)

See post, p. 342, for a report of the case.

[64] See Goods of Almosnino, 1 Sw. & Tr. 508 (1859). But see Van Straubenzee v. Monck, 3 Sw. & Tr. 6 (1862). Compare Pearce v. Gardner [1897] 1 Q. B. 688, where the question was whether a contract complied with the Statute of Frauds, and the words "Dear Sir" at the head of a letter were held to incorporate for the purposes of the statute the name on the envelope.

In re GOODS OF MARY REID.

(Court of Probate, 1868. 38 L. J. (N. S.) P. & M. 1.)

See post, p. 346, for a report of the case.

In re GOODS OF SMART.

(High Court of Justice, Probate Division. [1902] P. 238.)

GORELL BARNES, J. This is a motion to obtain the opinion of the Court as to whether a certain book, or lists in it, is to be incorporated with the will and codicil of Miss Ann Caroline Smart. The lady made a will on February 28, 1895, which contains a clause as follows: "I give to my said cousin, Margaret Rose Smart, all my furniture, books, plate, linen, wearing apparel, and personal effects of a like nature during her life for her own absolute use and benefit, and from and after her decease I direct my trustees to give to such of my friends as I may designate in a book or memorandum that will be found with this will the different articles specified for such friends in such book or memorandum, and as regards any of such articles not specifically disposed of by me, I declare that the said Margaret Rose Smart shall have full power to absolutely dispose thereof." At the time when this will was made, as far as I can make out from the affidavit which has been filed, there was no such book as that mentioned in the will, or, if there was, it is not in existence; but, after the date of that will, there is a book which I understand, though it is not deposed to on affidavit at present, is in the handwriting of the lady, beginning "1898. Hints for Executors; amended 1899," and on the fourth page, I think it is, of the book there commences a list with regard to clothing and other articles, and it is with regard to the articles mentioned in the book that the question really arises. After, at any rate, the date at which the book appears to have been written up, a codicil appears to have been made by the lady, dated July 27, 1900. I do not find that any reference is made to the book in any codicil; but the codicil before me deals with a considerable number of dispositions, and winds up by stating that in all other respects the testatrix confirms the said will.

The question is, therefore, whether the book, so far as it is referred to, if referred to at all, in that clause which I read from the will, is to be incorporated with the will and codicil. I have already practically intimated my view that it ought not to be incorporated, and I might have contented myself with saying that I come to that conclusion in consequence, principally, of a decision of the President in the case of Durham v. Northen [1895] P. 66; but Mr. Deane argued that that case was inconsistent with other authorities, and that the authorities were in conflict amongst themselves; so I desired to look

through them to see if that contention could be properly supported. Before referring very briefly to the cases, it seems to me desirable to state how the principle upon which this matter ought to be decided appears to my mind. It seems to me that it has been established that if a testator, in a testamentary paper duly executed, refers to an existing unattested testamentary paper, the instrument so referred to becomes part of his will; in other words, it is incorporated into it; but it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a written instrument then existing—that is, at the time of execution—in such terms that it may be ascertained.

A leading case upon this subject is Allen v. Maddock (1858) 11 Moo. P. C. 427, and it is desirable also to refer to In the Goods of Mary Sunderland (1866) L. R. 1 P. & M. 198. It will be seen from a statement of the principle in the form I have just given, that the document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document. If the document is not existing at the time of the will, but comes into existence afterwards, and then, after that again, there is a codicil confirming the will, the question arises, as it has done in a number of these cases, whether that document is incorporated. It appears to me that, following out the principle which I have already referred to, the will may be treated, by the confirmation given by the codicil, as executed again, and as speaking from the date of the codicil, and if the informal document is existing then, and is referred to in the will as existing, so as to identify it, there will be incorporation; but if the will, treated as being re-executed at the date of the codicil, still speaks in terms which shew that it is referring to a future document, then it appears to me there is no incorporation. I might put a clear concrete case. Suppose that the will said, "I wish certain articles to be disposed of by my executors in accordance with a list which I shall hereafter write," and the testator then wrote a list such as was contemplated, and then, after that, a codicil was made confirming the will, one of the conditions at the date of the codicil which is necessary for incorporation would be fulfilled, namely, the execution of a document; but the other condition would not be fulfilled, because the will, even speaking from the date of its so-called re-execution by that confirmation by the codicil, would still in terms refer to something which even then was future.

I have, perhaps, stated a little more fully than is necessary what was very clearly and shortly said by the President (Sir F. H. Jeune) in the case to which I have referred. [1895] P. 66. Now, referring very briefly to the other authorities, the first which Mr. Deane cited was the case of In the Goods of Hunt, 2 Rob. 622, where the learned

judge, Sir John Dodson, was dealing with two schedules which were to be annexed to the will, and where the codicil had been afterwards executed, and he allowed those documents to be incorporated; but it is clear, from reading the remarks which are reported, that no reasons whatever are given for the judgment, and it does not seem to me that there is anything to shew upon what principle the learned judge acted, or that he was then considering the principles applicable to this matter in the way in which they were subsequently and fully considered in the case of In the Goods of Lady Truro, L. R. 1 P. & M. 201.

The next case referred to was In the Goods of Stewart, 3 Sw. & Tr. 192, 4 Sw. & Tr. 211, where Sir Cresswell Cresswell said that the list which was mentioned in the will hardly conformed to the reference to it; but, acting upon In the Goods of Hunt [supra], he allowed the incorporation, though with doubts. There, again, no reasons were given; but in the case of In the Goods of Mathias, 3 Sw. & Tr. 100, decided two or three months later, but reported earlier in the same volume, Sir Cresswell Cresswell said no reasons were given for the decision in In the Goods of Hunt [supra], and he then acted contrary to it.

Next comes the important case of In the Goods of Lady Truro [supra], where the subject was very fully considered, and the principles, so far as I have stated them in my own way, are really laid down. Those principles were applied in In the Goods of Mary Sunderland, L. R. 1 P. & M. 198, and also in In the Goods of Mary Reid, 38 L. J. (P. & M.) 1; and lastly, they are restated and acted upon by the President in the case to which I have referred. [Durham v. Northen], [1895] P. 66.

Therefore, to my mind, it is clear that if the terms of the reference in this case indicate a document of a future character there is no incorporation. The words are: "I direct my trustees to give to such of my friends as I may designate in a book or memorandum that will be found with this will." That reference, made at the date of the will, was, I think, clearly made as to a future document. A document next comes into existence, and a codicil is afterwards made; but if you treat the will according to the cases, as speaking at the date of the codicil, the reference is still in terms to a document which, even then, is future, and therefore does not comply with one of the necessary conditions, namely, that it must refer to a document as existing at the date when the will is re-executed.

For these reasons I think there ought to be no incorporation of the book, or that part of it which it is sought to incorporate. I suppose that is sufficient to dispose of this application? This is clearly a case in which the executors ought to have the costs of this application out of the estate.

In re EMMONS' WILL.

(Supreme Court, Appellate Division, First Department, 1906. 110 App. Div. 701, 96 N. Y. Supp. 506.)

See post, p. 349, for a report of the case.

BRYAN'S APPEAL.

(Supreme Court of Errors of Connecticut, 1904. 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34.)

TORRANCE, C. J. The court of probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its 12th clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars ($50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate there were also offered for probate as a part of it, under the 12th clause of the will, two writings hereinafter referred to as Exhibits B and C.

The court of probate refused to approve or admit to probate as parts of said will each and both of these exhibits; and from that part of its decree an appeal was taken to the superior court, by William J. Bryan individually, and as trustee under the will as he claims it to be. The will admitted to probate is in the record called Exhibit A; while Exhibits B and C are letters which, as the appellant claims, constitute a part of the will. The will was executed in New York, and is dated the 22d day of May, 1900.

Exhibit B is a letter from the testator to his wife, of which the following is a copy:

"New York, 5/22/1900.

"My Dear Wife: In my will just executed I have bequeathed to you seventy-five thousand dollars (75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make bountiful provision for those you desire to remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will.

"It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Neb., or to his heirs if I survive him. I am earnestly

devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you alone. With love and kisses, P. S. Bennett."

Exhibit C was a typewritten duplicate of Exhibit B, except that the words "with love and kisses, P. S. Bennett," at the end of Exhibit B, were not contained in Exhibit C, nor was Exhibit C signed by the testator.

Respecting these exhibits the appellant in the Superior Court offered evidence tending to prove the following facts: that about a week or ten days before the date of the will, at the city of Lincoln, Nebraska, the testator, and Mr. Bryan and his wife, prepared a blank draft form of the will, which was subsequently filled out and executed, and that Exhibit C was then also prepared as a blank draft form from which Exhibit B was to be, and was subsequently, drawn; that Exhibit B was in the handwriting of the testator, and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: "Mrs. P. S. Bennett. To be read only by Mrs. Bennett, and by her alone, after my death. P. S. Bennett. [Seal.]"; that the testator, on the day after the date of the will, placed said will and said envelope containing Exhibit B in his box in a vault in the Wool Exchange Building in New York City, where they remained as he put them until after his death, the will being "separate from said letter and said sealed envelope"; and that Exhibit C, from the time it was drawn up, remained in Bennett's custody till his death, and was found soon after that event among his private papers, in an envelope subscribed in Bennett's handwriting as follows: "Copy of letter in Safe Deposit Company vault, Wool Exchange."

The appellant then offered Exhibit C in evidence as part of the will, claiming that it was the original and equivalent of the paper Exhibit B, "and that it was substantially the sealed letter referred to in paragraph 12 of the will." The court excluded the evidence. The appellant thereupon offered in evidence, as part of the will, the letter Exhibit B, and the court excluded it. The appellant also offered parol evidence tending to prove that Exhibit B was the instrument to which

reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that Exhibits B and C "are not either separately or together a part of the last will of said Philo S. Bennett, deceased"; and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated: (1) Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; (2) that even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and (3) that the letter, Exhibit B, shows on its face an intent on the part of the testator that it should not constitute a part of his will.

As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but in thus resting our decision upon the second ground we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may, by reference in a will, under certain conditions and limitations, become by such reference incorporated in the will as a part of it; and that too whether the document referred to is or is not a dispositive one; and one of the leading cases upon this subject is that of Allen v. Maddock, 11 Moore's P. C. C. 427, decided in 1858. This is known as the doctrine of incorporation by reference; and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in a signed instrument so as to constitute a memorandum in writing under the statute of frauds. The English rule appears to prevail in many of our sister States; but the question whether it prevails in this State, and if so, with what limitations and under what conditions, was left undetermined in Phelps v. Robbins, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions; but for the purposes of the argument we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here.

Two of the conditions, without the existence of which the English rule will not be applied, are concisely, but we think correctly, stated in Phelps v. Robbins, supra (page 272), as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case

upon this subject this language is used: "But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt." Estate of Young, 123 Cal. 337, 342, 55 Pac. 1011.

In an important and well considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained. * * * The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document." In the Goods of Smart, L. R. [1902] P. D. 238, 240.

Tested by the rules as thus laid down in the cases above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question here a large sum of money is given to Mrs. Bennett "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody, at any time after the will was executed, and "found with the will," would each fully and accurately answer the reference; and if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the execution of the will; "the vice is that no particular paper is referred to." Phelps v. Robbins, 40 Conn. 250, 273. Such a reference as is made in the present will is, in fact as well as in law, no reference at all; certainly it is not such a reference as the rules under the doctrine of incorporation by reference require in the case of wills.

A reference so defective as the one here in question cannot be helped out by what is called parol evidence; for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills. We know of no case, and in the able and helpful briefs filed in this case have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document.

Assuming then, without deciding, that the doctrine of incorporation prevails in this state, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.[65]

In re PLUMEL'S ESTATE.

(Supreme Court of California, 1907. 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100.)

SLOSS, J. J. F. Plumel, a resident of the city and county of San Francisco, died on July 11, 1905, leaving an estate consisting of his separate property. His sole heirs at law were three sisters, the appellants here, and his widow, Annie Plumel, the respondent.

Two instruments, written respectively on the obverse and reverse sides of a single sheet of paper, were offered for probate as the will and codicil of the decedent, and both were admitted to probate. From the order admitting the alleged will to probate, the sisters prosecute this appeal.

The will was dated January 12, 1904. By its terms, the residue of the estate, after certain bequests to the sisters and others, was given to the respondent, who is named as executrix. This instrument was not attested. It was entirely written, dated, and signed by the hand of the decedent, with the exception of the figures "190" in the date 1904. The figures "190" were printed.

Upon the back of the same sheet of paper the codicil was written. It complied with the requirements of the law regarding holographic wills, being entirely written, dated, and signed by the hand of the testator, and read as follows: "Codicil. Jan. 14, 1904. In case of railway or steamship disaster in which both myself and wife should be killed, I will and bequeath all property real or personal to my sisters resident in France, share and share alike. J. F. Plumel."

The will of January 12, 1904, being unattested and being invalid as a holographic will, because not entirely written, dated, and signed by the hand of the testator, was not, standing alone, entitled to be admitted to probate. Civ. Code, § 1277; Estate of Billings, 64 Cal. 427, 1 Pac. 701.

But the contention of the respondent is that the codicil incorporated in itself the terms of the will, and that, on proof of the due execution

[65] See Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753 (1864); Bryan v. Bigelow, 77 Conn. 604, 60 Atl. 266, 107 Am. St. Rep. 64 (1905).

It has finally been decided that the doctrine of incorporation by reference, as such, does not exist in Connecticut. Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058, 9 L. R. A. (N. S.) 310 (1907). The same is true of New York. Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238 (1891). Though with the qualifications pointed out in In re Emmons' Will, post, p. 349. But, though the paper attempted to be incorporated cannot be probated in such a state, it has been held that the duly executed part may be. In re Reins' Estate, 59 Misc. Rep. 126, 112 N. Y. Supp. 203 (1908); In re Emmons' Will, post, p. 349.

of the codicil, both documents were properly admitted to probate as the testamentary act of the decedent. This position is not, as the appellants assume, based on section 1287 of the Civil Code, which provides that "the execution of a codicil, referring to a previous will, has the effect to republish the will as modified by the codicil." It is not necessary here to consider whether this section has any application to the facts of this case. Apart from its terms, it has long been settled that a will or codicil executed in accordance with the requirements of statute may, by an appropriate reference, incorporate within itself a document or paper not so executed. 30 Am. & Eng. Ency. of Law (2d Ed.) 578; Habergham v. Vincent, 2 Ves. Jr. 204, 228; Smart v. Prujean, 6 Id. 560; Allen v. Maddock, 11 Moore's P. C. 427; Brown v. Clark, 77 N. Y. 369.

In Estate of Willey, 128 Cal. 1, 60 Pac. 471, this court quoted with approval the following language from 1 Redfield on the Law of Wills, page *264: "The cases already referred to show very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may nevertheless adopt an existing paper by reference. * * * This 'incorporation' of the paper referred to into the will so makes it a part of the instrument that no distinct proof of the paper is required, or even filing, in the probate court. The proof of the will sets up and establishes the paper, as a portion of itself, by proof of the reference to the consequent incorporation." And the court went on to say: "The principle is also substantially declared in the case of In re Soher, 78 Cal. 481, 21 Pac. 8. Of course, the reference must be certain, and to an instrument then in existence."

It is no doubt true, as is stated in the Willey Case, that in order to make out a case for the application of the doctrine of incorporation by reference, the paper referred to must not only be in existence at the time of the execution of the attested or properly executed paper, but that it must be referred to in the latter as an existent paper, so as to be capable of identification. But we think that in the present case there was a sufficient reference in the codicil to identify the will upon the obverse of the same sheet of paper as the instrument referred to. The later paper is designated by the testator as a "codicil" a term which in itself implies that it is an addition to or modification of some existing testamentary paper. "A codicil is some addition to or qualification of a last will and testament. A codicil is part of a will to which it is attached or referred, and both must be taken and construed together as one instrument." Proctor v. Clarke, 3 Redf. Sur. (N. Y.) 445, 448. By its very definition, the word "codicil" imports a reference to some prior paper as a will. And the fact that the codicil is written upon a sheet of paper containing a writing which purports to be testamentary in character is sufficient to justify the inference that such writing is the will referred to by the codicil.

In Jarman on Wills, *153, it is said: "It seems to have been considered, in the ecclesiastical courts at least, that the fact of the codicil being written on the same piece of paper as the prior will (though it does not in terms refer to such will) sufficiently indicates an intention to treat that as the subsisting will." In Hobart v. Hobart, 39 N. E. 581, 154 Ill. 610, 45 Am. St. Rep. 151, the court said: "Where the codicil is written on the same paper as the will, or clearly and unmistakably refers to the will, so as to preclude all doubt of its identity, proof of the codicil establishes the will without further proof, except such portions thereof as are revoked or altered by the codicil." In Goods of Heathcote, 6 P. D. 30, an invalid will was offered, together with a codicil upon the same sheet of paper, beginning with the words: "This is a codicil to the last will and testament of me." There was no further or other reference to any will, and there was no later will than the one contained upon the same sheet of paper as the codicil. It was held that there was a sufficient reference to allow the will to be probated.

In view of the meaning of the word "codicil," the language of the testatrix in the case just cited has no greater force as a reference to a prior will than has the single word "codicil" in the case at bar. In Harvy v. Chouteau, 14 Mo. 588, 55 Am. Dec. 120, where the paper incorporated was particularly described in the codicil, but not attached to it, the court said: "If the codicil had been attached by a wafer, * * * I presume there would have been no room for doubt. A list of decisions for more than 130 years sustains this point. What is the difference between this wafer annexation of a codicil, which may not mention the previous will, otherwise than by reciting that 'this is my codicil to my last will,' and the case before us?"

We are referred to no case holding that the fact that a codicil is physically attached to, or is written upon a paper containing a prior attempted testamentary disposition, is not to be considered as tending to establish that this prior writing is the one referred to in the codicil.

It is urged that the reference must be certain so as to enable the identification of the paper sought to be incorporated without the aid of evidence outside of the codicil itself, and that parol evidence is required to show that the will and the codicil are written on the same sheet of paper. It is true that there is some language in Estate of Young, 123 Cal. 337, 55 Pac. 1011, which, taken literally, tends to sustain the view that the identification of the paper to be incorporated must be possible from the face of the will or codicil alone. In that case the reference in the will was merely to "two deeds" which were not described in any way. Any two deeds, whenever executed, would have satisfied the reference. It was held, and beyond question rightly, that parol evidence was not admissible to show that the testatrix had two particular deeds in mind. But it is to be remembered that no reference, however explicit on its face, can identify a separate paper

without the production of evidence to show that the particular paper offered does correspond to the descriptive particulars named in the will.

We think the correct rule was stated by this court in Re Shillaber, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433, quoting from Allen v. Maddock, supra: "A reference in a will may be in such terms as to exclude oral testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that, where there is a reference to any written document, described as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question is, whether the evidence is sufficient for the purpose."

Similarly, in Brown v. Clark, supra, the Court of Appeals of New York said: "It is established by a long line of authorities that any testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct and clearly identifies, or renders capable of identification, by the aid of extrinsic proof, the document to which reference is made." See, also, Dickenson v. Stidolph, 11 C. B. (N. S.) 341.

As we have said, the use of the word "codicil" imports a reference to some already existing document, regarded by the testator as his will. To identify that instrument, and to interpret the reference as applying to it, the surrounding circumstances may be shown. We think there is nothing in the decision in Estate of Young which conflicts with the conclusion drawn from the authorities above cited—i. e., that the facts (1) that the codicil is written upon the same piece of paper as a writing purporting to be a will; and (2) that no other will is produced—may be considered as tending to identify the purported will as the one referred to.

The order appealed from is affirmed.[66]

In re BOYES.

BOYES v. CARRITT.

(Supreme Court of Judicature, Chancery Division, 1883. L. R. 26 Ch. D. 531.)

The will of the testator in this cause, dated the 1st of June, 1880, was in these words: "This is the last will and testament of me, George Edmund Boyes. * * * I direct the payment of my just debts and

[66] In Sharp v. Wallace, 83 Ky. 584 (1886), the court held that a signed but unattested will, not in the handwriting of the testator, could not be incorporated and validated by an unattested holographic codicil.

funeral and testamentary expenses as soon as conveniently may be after my decease by my executor hereinafter named, and subject thereto I give, devise, and bequeath all my real and personal estate whatsoever and wheresoever unto Frederick Blasson Carritt absolutely. And I appoint the said Frederick Blasson Carritt sole executor of this my will."

The testator died in April, 1882, at Ghent, leaving personal property only. Immediately after his death probate was granted to Mr. Carritt. Thereupon the plaintiff, John F. Boyes, one of the brothers and next of kin of the testator, instituted proceedings in the Probate Division of the High Court to recall probate. Mr. Carritt, who was the defendant in that action, was the solicitor and a private friend of the testator, and had himself prepared the will, and in answer to interrogatories administered to him in the probate action, Mr. Carritt stated as follows: That the testator communicated his intentions to him at the time when he made his will (which was made in London), and that such intentions were that the defendant should take the property as trustee upon trust to deal with it according to further directions, which the testator was to give by letter after his arrival on the Continent, whither he was then going within a day or two; and that he (Mr. Carritt) accepted the trust. That the deceased did go to the Continent within a day or two, but never gave any further directions in his lifetime. Upon receiving this answer the validity of the will was admitted, and the action to recall probate was discontinued.

This action was shortly afterwards brought by the next of kin of the testator against Mr. Carritt in order to obtain a declaration that they were beneficially entitled to his personal estate.

In his defense, Mr. Carritt said that in giving the instructions the testator expressed to him verbally his desire to provide for a certain lady and child, whose names he did not wish to appear in his will, and he therefore desired to leave the whole of his property to the defendant as trustee to act with respect thereto according to any further written directions which might be given to him.

In his oral evidence in this action the defendant confirmed these statements as accurately representing what he believed at the time, and said: "I gathered that I was to dispose of the estate as Mr. Boyes would direct me—the word 'trustee' was never used—the understanding was that he was to write to me, and I was to comply with his directions."

No such directions were ever in fact given by the testator to Mr. Carritt in his lifetime, but after his death there were found among his papers two letters, one dated the 10th of February, 1880 (which was proved to be a mistake for 1881), written at Antwerp, and which was in these words:

"F. B. Carritt, Esq.: I wish you to have five and twenty pounds of any property of which I may die possessed for the purchase of any

trinket in memoriam, everything else I give to Nell Brown, formerly Sears, and I appoint you sole trustee to act at your discretion.

"G. E. Boyes."

The other letter was in these terms:

"4th June, 1881.

"F. B. Carritt, Esq.—Dear Sir: In case of my death I wish Nell Brown to have all except twenty-five pounds in my memory.

"G. E. Boyes."

Neither of these letters was executed as a testamentary instrument.

Mrs. Brown was examined in this action, and she stated that the testator told her that he had written two letters to Mr. Carritt, one in case the other was lost. He directed her in case of his death to send immediately for Mr. Carritt. She did so, and having found these two letters among his papers, she placed them in Mr. Carritt's hands shortly after the testator's death.

KAY, J., after stating the facts of the case, continued:

The result of this is that Mr. Carritt admits that he is a trustee of all the property given to him by the will. He desires to carry out the wishes of the testator as expressed in the two letters, but of course he can only do so if they constitute a binding trust as against the next of kin.

If it had been expressed on the face of the will that the defendant was a trustee, but the trusts were not thereby declared, it is quite clear that no trust afterwards declared by a paper not executed as a will could be binding. Johnson v. Ball, 5 De G. & Sm. 85; Briggs v. Penny, 3 Mac. & G. 546; Singleton v. Tomlinson, 3 App. Cas. 404. In such a case the legatee would be trustee for the next of kin.

There is another well-known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it, has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property, or some part of it in a specified manner. In these cases the court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the gift. The principle of these decisions is precisely the same as in the case of an heir who has induced a testator not to make a will devising the estate away from him by a promise that if the estate were allowed to descend he would make a certain provision out of it for a named person; Stickland v. Aldridge, 9 Ves. 516; Wallgrave v. Tebbs, 2 K. & J. 313; McCormick v. Grogan, Law Rep. 4 H. L. 82. But no case has ever yet decided that a testator can by imposing a trust upon his devisee or legatee, the objects of which he does not communicate to him, enable himself to evade the Statute of Wills by declaring those objects in an unattested paper found after his death.

The essence of all those decisions is that the devisee or legatee accepts a particular trust which thereupon becomes binding upon him, and which it would be a fraud in him not to carry into effect.

If the trust was not declared when the will was made, it is essential in order to make it binding, that it should be communicated to the devisee or legatee in the testator's lifetime and that he should accept that particular trust. It may possibly be that he would be bound if the trust had been put in writing and placed in his hands in a sealed envelope, and he had engaged that he would hold the property given to him by the will upon the trust so declared although he did not know the actual terms of the trust: McCormick v. Grogan. But the reason is that it must be assumed if he had not so accepted the will would be revoked.

Suppose the case of an engagement to hold the property not upon the terms of any paper communicated to the legatee or put into his hands, but of any paper that might be found after the testator's death. The evidence in this case does not amount to that, but if it did the rule of law would intervene, which prevents a testator from declaring trusts in such a manner by a paper which was not executed as a will or codicil. The legatee might be a trustee, but the trust declared by such an unattested paper would not be good. For this purpose there is no difference whether the devisee or legatee is declared to be a trustee on the face of the will, or by an engagement with the testator not appearing on the will. The devisee or legatee cannot by accepting an indefinite trust enable the testator to make an unattested codicil.

I cannot help regretting that the testator's intention of bounty should fail by reason of an informality of this kind, but in my opinion it would be a serious innovation upon the law relating to testamentary instruments if this were to be established as a trust in her favour.

The defendant, however, having admitted that he is only a trustee, I must hold, on the authority of Muckleston v. Brown, 6 Ves. 52, Briggs v. Penny, 3 Mac. & G. 546, and Johnson v. Ball, 5 De G. & Sm. 85, that he is a trustee of this property for the next of kin of the testator. I can only hope they will consider the claim which this lady has upon their generosity.[67]

[67] No distinction on principle exists whether the devise is on its face to the devisee absolutely, or "in trust" but the trust is not expressed.

"The result of the cases appears to me to be that a testator cannot by his will reserve to himself the right of disposing subsequently of property by an instrument not executed as required by the statute, or by parol; but that when, at the time of making his will, he has formed the intention that a legacy thereby given shall be disposed of by the legatee in a particular manner, not thereby disclosed, but communicated to the legatee and assented to by him, at or before the making of the will, or probably, according to Moss v. Cooper, 1 J. & H. 253, subsequently to the making of it, the court will allow such trust to be proved by the admission of the legatee, or other parol evidence, and will, if it be legal, give effect to it. The same prin-

In re MOORE.

(Prerogative Court of New Jersey, 1900. 61 N. J. Eq. 616, 47 Atl. 731.)

REED, Vice Ordinary. James Moore died August 14, 1897, leaving a will, which was probated August 27, 1897, and letters testamentary issued to James H. Moore, his son and surviving executor.

The will contained the following clause:

"In making division of my property aforesaid as above directed I hereby further direct that certain amounts of money that I have already advanced or may hereafter advance to certain of my children, shall in each case be charged against the portion of each of said children, and be inventoried as part of the estate of which I may die seized,

ciple which led this court, whether wisely or not, to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, appears to me to apply to cases where the will shows that some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise. No doubt the fraud would be of a different kind if he could by means of it retain the benefit of the legacy for himself; but it appears that it would also be a fraud, though the result would be to defeat the expressed intention for the benefit of the heir, next of kin, or residuary devisees." Vice Chancellor Chatterton, in Riordan v. Banon, Irish Rep. 10 Eq. 469, 477, 478 (1876). See, also, Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157 (1889); Cagney v. O'Brien, 83 Ill. 72 (1876). But see Olliffe v. Wells, 130 Mass. 221 (1881); Sims v. Sims, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772 (1897); Heidenheimer v. Bauman, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29 (1892), holding that where the devise is "in trust," but the trust is not expressed in the will, the devisee, though the testator communicates the trust to him, holds for the heirs or next of kin, and not for the intended cestui.

In Bryan v. Bigelow, 77 Conn. 604, 60 Atl. 266, 107 Am. St. Rep. 64 (1905), the court, having refused in Bryan's Appeal, supra, p. 211, to regard the letter as incorporated in the will, refused to treat it as creating a trust. The court said: "To treat this letter as an operative declaration of trust would be, in effect, to hold that a testamentary disposition of property could be made by an instrument not executed in conformity with the statute regulating such transfers of property." 77 Conn. 612, 613, 60 Atl. 269, 107 Am. St. Rep. 64 (1904). That neither Mrs. Bennett nor the other residuary legatees were trustees ex maleficio was also held, because "neither the evidence excluded nor the facts proved show any agreement, express or implied, by Mrs. Bennett, or the other residuary legatees, to accept the money upon the trust described in Exhibit 1, or that during the lifetime of the testator they even knew of any of the provisions of the twelfth clause of the will." 77 Conn. 616, 60 Atl. 270, 107 Am. St. Rep. 64 (1904).

"In re Stead [1900] 1 Ch. 237, is an interesting case: A gift to A. and B. jointly. A. is told, but B. is not told, of the trust. A. is bound as to an undivided moiety. Is B. bound? Yes, if the trust was told to A. before the making of the will; no, if it was only told to A. afterwards. This distinction rests on no sound reason, as, indeed, Farwell, J., points out. You must accept it as the result of two lines of cases—the one set asserting a rule that no person can claim an interest under a fraud committed by another, whilst the other set was decided in the opposite way, lest otherwise one beneficiary might be enabled to deprive the rest of their benefits by setting up some secret trust communicated to himself alone." Maitland's Equity and the Forms of Action at Common Law, 61, 62.

at the full amount of the charge in each instance, but without interest thereon. All such charges are contained in sealed envelopes to be found with this my last will. All other evidence of indebtedness against any of my said children, which I may have at my death, I hereby give and bequeath to such debtors, respectively, to each child the evidence of his or her indebtedness, and discharge each of said debtors from all his or her obligations in respect to such and all indebtedness for any such advances or debts, except such as I have heretofore specified as being left with this my will.

"These amounts I cannot at present certainly indicate, as they are liable to be changed before my death by payments to be made or by further advances by me."

After the testator's death the executors found the will in a sealed envelope, and with it three other papers, signed by the testator, one of which was in the following form:

"Elizabeth, N. J., February 22, 1893.

"The sum of $14,000 is to be charged to account of my son Thomas (without interest) for money heretofore advanced by me to him in accordance with the provisions of my will contained in the third section thereof. James Moore."

The point taken by Thomas Moore, the exceptant, is that "this paper is an attempt to add to, change or complete the provisions of a will by a subsequent paper not executed with the formalities required by the statute of wills."

There is no doubt that a testator can provide that the amount to be received by a legatee shall be dependent upon a condition of fact to be ascertained aliunde. Some of these conditions are noted by Chief Justice Denio, in his opinion in the leading case of Langdon v. Astor's Executors, 16 N. Y. 9, 26.

This is so, even though the condition may be brought about by the testator himself. Stubbs v. Sargon, 3 Myl. & C. 507.

The testator could have provided that all advances made to, or debts owing by, a legatee, whether made or incurred before or after the execution of the will, should be deducted from his portion. Such amount may be ascertained by parol evidence, and may be varied by advancements made subsequent to the execution of the will. 1 Underh. Wills. 447.

A frequent testamentary provision is that such debts or advancements as are charged on testator's books against legatees shall be deducted, and these provisions are valid. Robert v. Corning, 89 N. Y. 227.

When a testator provides that such advancements as are indicated by entries, to be subsequently made by him, shall be deducted from the share or legacy, a mere entry, it seems, unless there have been advancements in fact, will not suffice. Hoak v. Hoak, 5 Watts (Pa.) 80.

Parol evidence is admissible to support the book entries. Estate of Mussleman, 5 Watts (Pa.) 9; Gilman v. Gilman, 63 N. Y. 41.

In the present case I think it appears that, before the execution of the will, testator had paid to, and for the benefit of, the exceptant moneys, which were never repaid, to an amount in excess of $14,000. It is to this sum that the testator alludes when he speaks of the amounts of money "that I have already advanced." The checks produced, taken in connection with the explanation of the exceptant himself, seem to establish this fact.[68]

It is true, the exceptant says, after admitting advances to the amount of $15,000, that he is equitably entitled to a deduction, because his father promised to make up to him certain commissions for the sale of the Staten Island Railroad, if his son would abandon his suit for the same. He does not say that his father promised to make it up to him in any particular manner. It does not appear whether it was to be made up to him by relieving the son from the amount which he (the father) had loaned to the firm of Mason, Peas & Moore and the firm of Peas & Moore, for which sum his son, as a member of the bankrupt firm, was responsible, or whether he was to make it up to him in some other unexplained manner. So I am of the opinion that the testator had the right to regard the $15,000 in money, which the exceptant admittedly received, as money advanced.

Now, the testator having the right to provide that such advances should be charged to the portion of exceptant, the question remains, did he defeat his intention to charge some of the advances by providing that the amount which he intended to charge should be evidenced by a paper made subsequently to the execution of his will?

In my judgment the paper which contained the charge is not to be regarded as testamentary in its character. The effect of the contents of the paper was restrictive. Suppose the testator had said, I charge all the debts owing to me, which I have not discharged or forgiven at

[68] "Proponent offered in evidence certain account books kept by the deceased, showing advancements made to his children, the contestants, from time to time. The entries showing these advancements were proven to have been in the handwriting of the deceased, and the books were fully identified. Objections to these entries were sustained. While it is, no doubt, true that these books of account were inadmissible, under our statutes relating to the admission of books of account, yet the entries therein made were written declarations of the deceased with reference to the disposition of some of his property before executing the will, and as such they were admissible. This is especially true in this case, for the other evidence tends very strongly to show that the reason why he did not remember his children was due to the fact that he had already made provisions for them. Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072, and cases cited. These written declarations of the deceased to the effect that he had made certain advancements to his children should have been admitted in evidence for the purpose of showing the state of his mind at the time he executed the will. True, they may not prove that the advancements were in fact made, but the evidence was quite material in considering the condition of the deceased's mind, and the feelings which prompted him, at the time he made his will." Deemer, J., in In re Perkins' Estate, 109 Iowa, 218, 80 N. W. 330 (1899).

the time of my death, and the receipt, release or paper evidencing such discharge will be found with my will. This would seem analogous to a provision containing a gift of certain property, unless it should be conveyed before the testator's death. The fact that he mentioned where such deed or conveyance could be found, if made, would be in no degree material. It being proved that more than $14,000 had been advanced to this legatee, the paper which expressly charged him with only $14,000 was impliedly a gift of the remainder of the advances.

I think that the decree of the orphans' court should be affirmed.[69]

[69] See In re Harris' Estate, 82 Vt. 199, 72 Atl. 912 (1909); In re Bresler's Estate, 155 Mich. 567, 119 N. W. 1104 (1909); Holmes v. Coates, 159 Mass. 226, 34 N. E. 190 (1893).

In Stubbs v. Sargon, 3 Myl. & C. 507 (1838), a trust to dispose of certain property and divide the proceeds amongst those of testatrix's partners who should be in partnership with her at the time of her death or to whom she might have disposed of her business was upheld. In so deciding Lord Chancellor Cottenham said:

"In the present case, the disposition is complete. The devisee, indeed, is to be ascertained by a description contained in the will; but such is the case with many unquestionable devises. A devise to a second or third son, perhaps unborn at the time, many contingent devises, all shifting clauses, are instances of devises to devisees who are to be ascertained by future events and contingencies; but such persons may be ascertained, not only by future natural events and contingencies, but by acts of third persons. Suppose a father, having two sons, and having a relation who has a power of appointing an estate to some one of them, makes his will, and gives his own estate to such one of his sons as shall not be the appointee of the other estate, or with a shifting clause. Here the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent this, because the devise by the will is complete; that is, the disposition is complete. The intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and fixing the identity of the devisee, were to be considered as testamentary, in the case above supposed, the donee of the power would be making or completing the will of the father; that is, one man would be making another man's will. The act, therefore, is not testamentary; and, if not, then why should not the act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but, if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, or give legacies charged upon land, to such person as might be his wife at his death, to such children as he might have, or to such servant as he might have in his service at his death. The cases of charging legacies generally by a will, and naming legatees by an unattested instrument, carry this principle to the greatest length, because the subsequent act ascertaining the party to take is also testamentary; but that rule is recognized by Lord Rosslyn in Habergham v. Vincent, and Sir W. Grant, in Rose v. Cunynghame, 12 Ves. 29 (see page 38), explains it upon the principle I have adverted to. He says the will creates the charge: it is only necessary to show that there is a legacy; for the moment that character is shown to belong to the demand, you show that it is already charged upon the land; and his decision in that case marked the distinction, for the testator did not charge his legacies by his will, and name the legatee by a codicil; but he devised his estate to pay such legacies as he should bequeath to be paid out of his estate; and afterwards, by an unattested codicil, attempted to charge a legacy upon the estate; which Sir W. Grant held he could not do, because, not only is the legatee to be found in the codicil, but the will to make the charge—that d-

HARTWELL et al. v. MARTIN et al.

(Court of Chancery of New Jersey, 1906. 71 N. J. Eq. 157, 63 Atl. 754.)

BERGEN, V. C.[70] The complainants, as executors of the last will of Alfred W. Martin, seek directions to aid them in the administration of the trusts in their hands under the will of their testator. Of the numerous questions presented in the bill of complaint, only four were pressed on the argument.

The first arises under the second item of the will, which reads as follows: "I wish my executors to make a settlement with my creditors of what debts I have outstanding at the time I made an assignment, I think in 1872, although not under obligation to pay these claims yet I wish them paid. My executors must make a settlement of the principal without interest, and I also wish those who have received their dividend to be paid less the dividend they received as well as those creditors who did not hand in their claims. A list of all debts that I wish paid will be found enclosed with this will."

The direction is to pay all his debts outstanding in 1872, without naming the persons to whom payment is to be made, and to ascertain who are embraced in that class he refers his representatives to "a list of all debts I wish paid," to be found inclosed with his will. The will was executed in duplicate. One of them he gave to his executor together with a list containing not only the names of some of his creditors in 1872, who had presented their claims to his assignee, and of those who had not, but also a list of creditors to whom he was liable for subsequent debts. The names of the creditors and the amounts due are each set out with particularity. The other will the testator retained, and it was found in a box where he kept his valuable papers and with it a partial list of his creditors at the date of the assignment, and the amounts due each. This list does not correspond, as to amounts, with the list held by his executor, for in some cases they are reduced, as appears from an inspection of the paper, to the extent of

being to be found in the will. I think, therefore, the objection upon the ground of the Statute of Frauds cannot be supported." Id. 511, 512.

In Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526 (1897), the will provided that "whoever should take care of me and maintain, nurse, clothe and furnish me with proper medical treatment at my request, during the time of my life yet when I shall need the same, shall have all of my property of every name, kind and description left at my death." In awarding the property to the person who met the requirement, the court said (148 Ind. 297, at page 304, 47 N. E. 631, at page 633 [62 Am. St. Rep. 526]): "This person, it is true, depended upon the future volition of the testatrix in being chosen to perform the exacted services and upon the consent of the latter in accepting the request and in discharging the obligation imposed by the will; but the subsequent volition exercised by Mrs. Shull [the testatrix] in this respect cannot be deemed or considered in a legal sense as testamentary in its nature or character."

[70] Part only of the opinion is given.

payments made by the testator after the execution of his will. It was shown on the trial that neither list contained the names of all the creditors mentioned in the schedule attached to the deed of assignment, nor of all the creditors who had proved and filed their claims.

Under this state of facts, such of the creditors as were omitted by the testator from the list he made out claim that, under the terms of the will, they are to be considered in the class to be paid, and that the general direction to pay is not to be modified by the list left by the testator, according to which he expressed his intention that payments should be made. He was under no legal obligation to pay these debts, for they were all either extinguished by the assignment proceedings, or subject to the statute of limitations, and I am of opinion that if the bequest is good it must be limited to the debts contained in the list left by the testator with the will.

It is insisted, however, by the other legatees that the whole bequest is void, because the persons who were to take are not named individually, but as a class, and in order to ascertain who constitute the class, reference must be made to a paper not executed according to the law of wills. It is clear that this case differs from one where legacies are given subject to deductions for advancements to be ascertained from charges in a book of account, or other evidence thereof to which the testator may refer, for in such case the testamentary disposition is complete and needs no aid from other sources although subject to debts or advancements, for they may be proved without reference to any memoranda. The gift is complete, its payment during the life of the testator in whole or in part may be shown in exoneration of it, and therefore, in determining the question under consideration, we are afforded no assistance by Moore's Case, 61 N. J. Eq. 616, 47 Atl. 731, for there the disposition was testamentary, subject to advancements which the testator restricted to the amount he considered he had advanced.

My conclusion on this branch of the case is that the bequest to the creditors of the testator now under consideration is void, because it is an attempt to bequeath property to a class of persons who can only be ascertained by reference to a nontestamentary paper which the testator might change from day to day, and thus enlarge or diminish his testamentary gifts as often as he chose without observing the rules of law relating to the testamentary disposition of property. The effect, if it should be permitted, would be to allow a testator to declare the particular legatees to whom his estate should go without the formality required by law in such cases. * * *

CHAPTER VII

THE REVOCATION OF WILLS

SECTION 1.—STATUTES

THE STATUTE OF FRAUDS.

VI. And, moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burned, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same; any former law or usage to the contrary notwithstanding.

XXII. And be it further enacted that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him; and proved to be so done by three witnesses at the least.

29 Car. II, c. 3, §§ VI, XXII (1677).

THE WILLS ACT.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the per-

[1] On the revocation of wills, see 28 Am. St. Rep. 344, note; 7 L. R. A. 561, note.

son entitled as his or her next of kin, under the Statute of Distribution).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed with reference to the real and personal estate comprised in it as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

7 Wm. IV & 1 Vict. c. 26, §§ XVIII–XXIV (1837).

SECTION 2.—REVOCATION BY SUBSEQUENT INSTRUMENT

BROOK v. WARDE.

(Nisi Prius. 1572. 3 Dyer, 310b.)

One Kyete, of Kent, by his will in writing, devised his land of gavelkind to one Harrison in fee; and five days before his death he revoked his will in this point, by parol only, in the presence of three witnesses, requiring their testimony of his present revocation; and

said to them further, that he would alter this in his written will when he came to town, &c., and before his coming thither he was murdered by the said Harrison. And Harrison caused the will in writing, as it was at first, to be proved; and by color thereof entered into the devise, and then was attainted of murder, and hanged: and his son entered by the law of gavelkind, *s.* The father to the bough, the son to the plough. This matter came out in evidence to a jury of Kent this term, in ejectione firmæ between Brooke and Warde; and this manner of revocation by parol as above was affirmed for sufficient revocation at bar and bench, although it was not in writing, nor the first will in that point cancelled or defaced; vide bene.[2]

LYON v. DADA.

(Supreme Court of Michigan, 1901. 127 Mich. 395, 86 N. W. 946.)

MONTGOMERY, C. J. This is an appeal from an order of the circuit court refusing probate to the will of Laura E. Dada, deceased. A will of later date was offered for probate, and the decision denying probate to this will was affirmed by this court in Lyon v. Dada, 111 Mich. 340, 69 N. W. 654. That later purported will contained a clause revoking all former wills.

The question presented by this appeal is whether denial of probate to this will is res adjudicata upon the question of whether it revokes the former will. This question was before the court of Massachusetts in the early case of Laughton v. Atkins, 1 Pick. 535, where this subject is treated in an able and exhaustive opinion by Parker, C. J. The principles to be extracted from that case are that all persons interested in an estate are parties to the probate proceedings, and bound by them, and that the disallowance of a will in toto on the ground of undue influence amounts to a determination that the revocatory clause is in-

[2] "In England, before the statute of frauds, a written will might be revoked by a nuncupative testament, and it was in consequence of an atrocious conspiracy to set up a nuncupative will over a prior written one that the glaring defect in the law came to be perceived, and that the statute was passed. The history of the transaction is given in a note to Matthews v. Warner, 4 Ves. 196. Mr. Cole, three years before his death, had made a written will giving £3,000 to charitable uses. Mrs. Cole set up a nuncupative will, by which the whole estate was given to her. Upon the trial it appeared that most of the witnesses to this will were perjured, and that Mrs. Cole was guilty of subornation. And upon this occasion Lord Nottingham said: 'I hope to see, one day, a law that no written will should be revoked, but by writing.' The next year, the statute of frauds was passed. * * * There are very good reasons why an individual, he who has not yet executed a written will, should be permitted, under peculiar circumstances to make a verbal one. But when he has already executed a written will, with all the solemnities of the law, there are equally strong reasons why the revocation of it should be attended with the same solemnities." Grimke, J., in Devisees of David McCune v. House, 8 Ohio, 144, 145, 31 Am. Dec. 433 (1837).

effectual. This case was cited and followed in Rudy v. Ulrich, 69 Pa. 177, 8 Am. Rep. 238, and is cited and approved in Wallis v. Wallis, 114 Mass. 512.

In the present case it was determined in the former issue that the entire will was void on the ground of undue influence. There was no attempt to probate any part of the will, nor was the determination confined to any single clause of the will. We think the case is within the principle of those cited. See, also, Dudley v. Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959.

The judgment of the circuit court will be reversed, and an order entered admitting the will to probate. The appellant will be entitled to recover his costs, to be paid out of the estate.

HOOKER, J., did not sit. The other justices concurred.[3]

[3] The same doctrine holds where the later will is rejected for lack of testamentary capacity. In the Matter of the Probate of the Will of David Goldsticker, 192 N. Y. 35, 84 N. E. 581 (1908). See cases cited in 18 L. R. A. (N. S.) 99, note. But in New York the decree rejecting probate is not conclusive as regards realty, because a decree admitting a will to probate is in that state conclusive only as to personalty. Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628 (1896).

"A will legally made stands until legally revoked. It cannot be revoked by any act of destruction, unless the act is done with an intention to revoke; and a person, not having testamentary capacity, cannot have an intention to revoke a will. He is legally incapable of it. In such case the burning of the will can have no effect whatever, provided the contents can be clearly and certainly proved by other evidence. The written instrument may be burnt, the surest and best evidence of the will may be destroyed, but the will itself, if a draft of it can be proved, outlives the act of destruction, and the testamentary dispositions stand. * * * I am of the opinion that the same result follows where the act of destruction is produced by undue influence, as where incapacity exists. There can hardly be a logical difference, whether the act of destruction be accomplished by a testator who has no mind to exercise, or, having a mind of his own, is prevented from exercising it. Insanity takes away testamentary capacity, while undue influence does not allow it to act. There must be animus revocandi. In the one case providence prevents it; in the other case it is prevented by the wrongful act of man. In each case the hand of the testator acts; but the mind does not go with the act." Peters, J., in Rich v. Gilkey, 73 Me. 595, 597, 601 (1881). On the probate of a will which was revoked as a result of undue influence, see Batton v. Watson, 13 Ga. 63, 58 Am. Dec. 504 (1853); Voorhees v. Voorhees, 39 N. Y. 463, 100 Am. Dec. 458 (1868). See, also, McIntire v. Worthington, 68 Md. 203, 12 Atl. 251 (1887); Laughton v. Atkins, 1 Pick. (Mass.) 535, 546, 547 (1823).

In Rudy v. Ulrich, 69 Pa. 177, 8 Am. Rep. 238 (1871), where in prior litigation a later will had been found invalid as an entirety because of undue influence, and then in the case at bar the jury found that there was no undue influence as to the revocation, the court held that it was reversible error to submit to the jury the question of whether the later will revoked the earlier, as a collateral attack on the earlier decree could not be allowed. Besides, said the court, "it cannot be known with any degree of assurance, sufficient to justify a legal judgment, that where there is a clause of revocation in a will making a certain disposition of property, that the testator really intended to revoke a prior will making a different disposition, except for the purpose of substituting in place thereof that contained in the second will." 69 Pa. 183, 8 Am. Rep. 238.

On the effect of acquiescence in the destruction of a will under a statute providing for the establishment of destroyed wills, see Parsons v. Batson, 129 Wis. 311, 109 N. W. 136 (1906). At pages 318, 319, of 129 Wis., and page

DENNY v. BARTON.

(Ecclesiastical Court, 1818. 2 Phillimore, 575.)

William Harris of New Alresford, in Hampshire, died in May, 1817, possessed of about £24,000 personal property, leaving a will dated 13th of March, 1812, and a codicil of the 26th of October, 1815. Probate of both these instruments was granted in common form in July, 1817, to Charles Barton and Jonathan Rashleigh, two of the executors named in them.

A second codicil was now propounded in an allegation by Louisa Denny, a natural daughter of the deceased. The codicil was in the shape of a letter dated in June, 1808, and addressed and endorsed as follows: "To Joseph Leacock, Esq., not to be opened until after the death of William Harris, Esq." Joseph Leacock was a nephew of the deceased, and the residuary legatee and one of the executors under the will which had been proved; but he was in the West Indies at the time of his uncle's death, and had died before he had arrived in England. In the will there was a clause revocatory of all former wills.

The letter was as follows:

"My dear Joe.—I find I am not long for this world; and shall, therefore, disclose to you a secret which is known to very few, though Mrs. Harris is acquainted with it. I have a natural daughter, by the name of Louisa Denny, who is now a teacher at a lady's boarding school, at Hampstead; the name of the governess who keeps the school is Scriven. I have bred up this girl with care and attention, and have given her a good education. I have not mentioned her in my will, because the world should not know of my indiscretion; but I desire you (to whom I have left all my property) to pay within six months after my decease, to this young lady, one thousand pounds sterling, or allow her an annuity of fifty pounds per annum, from the day of

138 of 109 N. W., Kerwin, J., says: "It is argued that section 3791, St. 1898, contains no limitation, and provides that, whenever any will of real estate or personal property shall be lost or destroyed by accident or design, the county court shall have power to take proof of the execution and validity of such will and establish the same. But the statute must have a reasonable construction in furtherance of justice and the object of its enactment. The question in all cases of reproduction of destroyed wills under this statute is whether the circumstances of destruction and acquiescence amount to a revocation. It would seem that the rule most consonant with the statute is that if knowledge of the destruction of the lost will be not brought home to the testator within such time as would reasonably enable him to reproduce it, or if he was prevented from so doing, it might be probated upon proper proof of the facts; but where reasonable time elapses after knowledge of the destruction, coupled with opportunity to reproduce the destroyed will, a presumption of revocation arises, and the destroyed will cannot be admitted to probate." See, also, Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209, 89 Am. St. Rep. 854 (1902). Quære as to the effect of such a statute where a will is destroyed as a result of undue influence? But that, in the absence of special statute a destruction cannot become by ratification a revocation, see note to Giles v. Warren, post, p. 246.

my death. I further desire you will pay to her mother, whose name is Sarah Whitear, living in East Street, in the town of Alresford, with her mother as a mantua-maker, an annuity of twenty-five pounds per annum, from the day of my decease, in quarterly payments. I have always found you to be a good lad; and I trust, as a man of honour, you will attend and follow the directions I have here given you, in the same manner as though contained in my will. My friend, Captain Sealy, who lives at No. 19, Guildford street, will give you further information respecting Louisa. God bless you, my dear Joe.

"I am your sincere friend and affectionate uncle, William Harris.

"P. S.—I have a little money in the three per cent. consolidated funds which will enable you to discharge the above legacy and annuity.

"June, 1808."

Sir JOHN NICHOLL. There is no doubt in this case. The codicil is in the form of a letter; but it is quite clear that the deceased intended it to be a confidential trust to his nephew not to be communicated till after his death. It was intended to operate independently of his will. I should not consider it irrevocable; but I think a will with a common revocatory clause would not revoke this paper. There have been a variety of instances in which papers of this sort have been admitted to probate. It was found uncancelled and unrevoked; and it has only been in consequence of the nephew's death that it has been necessary to bring it before the court.

I am clearly of opinion that it can operate; and that it was not intended to be revoked, notwithstanding the revocatory clause in the will; and, therefore, I admit the allegation.[4]

CADELL v. WILCOCKS.

(High Court of Justice, Probate Division. [1898] P. 21.)

Sir F. H. JEUNE, President.[5] The question in this case is, which of three wills made respectively on April 26, 1890, July 5, 1894, and September 5, 1895, by the testatrix, Mrs. Lucy Biddulph, should be admitted to probate.

The father of the testatrix, Robert Bickerstaffe, left £16,000 among his four daughters in equal shares for life, with power of appointment

[4] "Even if the second instrument contains a general revocatory clause, that is not conclusive, and the court will, notwithstanding, consider whether is was the intention of the testator to revoke a bequest contained in a previous will. Denny v. Barton, 2 Phillim. 575. On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative." Sir J. Hannen, President, in Dempsey v. Lawson, 2 P. D. 98, 107 (1877). See note 13 to Simpson v. Foxon, post, p. 238.

[5] The statement of facts is omitted.

to each of them by will amongst her children, and, in default of appointment, to her children equally.

At the time of the will of 1890, the testatrix had two daughters, Anne, then married, and Gertrude, then a widow, and three sons, Middleton, Assheton, and Franc. By the will of 1890 the testatrix, after revoking all previous wills, gave her daughter Gertrude "the sum of £4,000 absolutely for her sole use and benefit," describing it as "being the sum left to me by the will of my father the late Robert Bickerstaffe." She then bequeathed £50 to her steward, Finton McDonald, and the residue of her property to her five children equally, and appointed her sons, Middleton and Assheton, executors. It was not denied before me that this was a good execution by the testatrix of the limited power of appointment vested in her by the will of her father.

Between the wills of 1890 and 1894 the daughter Gertrude married Dr. Nevil Cadell, and I understand that the sons Middleton and Assheton received a benefit under the will of an uncle, the testatrix's brother. By her will of 1894 the testatrix bequeathed to her daughter Gertrude "the sum of £4,000 for her own absolute use and benefit, and to dispose of as she may think fit." She then gave £50 to her steward, Finton McDonald, and the residue of her property to her children Franc and Gertrude equally, and appointed Franc, Gertrude and Dr. Nevil Cadell executors.

Between the wills of 1894 and 1895, Franc, the son of the testatrix, and also the steward died. A letter of the testatrix containing her instructions for the will of 1895 was produced to me, but I do not think it material. By the will of 1895 the testatrix made a bequest to her daughter Gertrude in these terms: "All the property real freehold or personal wheresoever situate of which I may die seised or possessed for her own absolute use and benefit and to dispose of as she may think fit," and gave the same, in case of her daughter predeceasing her, to her daughter's husband, Dr. Nevil Cadell, and appointed her daughter and Dr. Cadell executrix and executor.

Neither the will of 1894, nor the will of 1895, contained any words of revocation; and it was not disputed before me that neither the terms of the will of 1894, nor those of the will of 1895, were sufficient to effect a valid execution of the limited power of appointment vested in the testatrix.

I think that this case is governed by the familiar principle of law stated in Williams on Executors (9th Ed.) p. 138, and approved by Lord Penzance in Lemage v. Goodban, 1 P. & D. 57, that the mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together, and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent.

In this case there was clearly no express revocation, in whole or in part, of the will of 1890 by either the will of 1894 or the will of 1895. I assent to Mr. Inderwick's contention that, had there been a general clause of revocation in either the will of 1894 or that of 1895, it would have revoked the whole will of 1890, including the execution of the power contained in it. The opinion indeed of the Delegates in the case of Hughes v. Turner, 4 Hagg. Ecc. 30, at page 71, if correctly reported, would appear to be to the effect that a clause of revocation per se does not revoke the portion of an earlier will which has executed a power; and in In the Goods of Merritt, 1 Sw. & Tr. 112, and in In the Goods of Joys, 4 Sw. & Tr. 214, Sir Cresswell Cresswell expressed a similar opinion. It might be considered doubtful whether the case of Sotheran v. Dening, 20 Ch. D. 99, in the Court of Appeal overruled those authorities, because weight was given to the consideration, which arose in that case, that by virtue of the 27th section of the Wills Act a general bequest operated on the subject-matter of the power of appointment, and so strengthened the evidence in favor of an intention to revoke its previous execution. But in In re Kingdon, 32 Ch. D. 604, the question of revocation by a general revocatory clause arose simpliciter, there being no subsequent provision relating to the subject-matter of the power in question, and Kay, J., clearly considered that he was justified by the authority of Sotheran v. Dening [supra] in holding that a will executing a power was revoked in toto by general words of revocation in a subsequent will. The effect of his decision is, I venture to think, that on this point of law common sense at last prevailed. I cannot understand why express words, revoking all previous wills, should be supposed to spare an execution of a power contained in one or more of them from the fate inflicted on all the rest of their contents. But, in the present instance, there are no express words to revoke the will of 1890.

Next, is there anything in the wills of 1894 or 1895 inconsistent with the execution of the power in the will of 1890, or, in other words, is there anything that by implication effects a revocation of that execution? It is not necessary to consider whether, if the power of appointment in this case had been general and not, as it was, limited, the general bequests in the wills of 1894 and 1895 would have been not only, by virtue of the 27th section of the Wills Act, effectual to execute the power, but also sufficient to revoke a previous execution of it. It is, I think, clear that these general words of bequest, which do not execute the limited power, as the 27th section of the Wills Act has no application, cannot revoke or affect its previous execution. The wills of 1890 and 1895 can, therefore, stand together; and, subject to proof in common form, there should be probate of both of them. The will of 1894 I regard as revoked by that of 1895, as both wills profess to deal with the whole of the testatrix's own property.[6]

[6] "Prima facie every document purporting to be testamentary, and signed and witnessed in accordance with the provisions of the Wills Act, ought

WALCOTT v. OCHTERLONY.

(Prerogative Court of Canterbury, 1837. 1 Curt. 580.)

Sir HERBERT JENNER.[7] Charlotte Anne Montgomerie Ochterlony, the deceased in this case, died at Edinburgh, on the 9th of June, 1835, of the age of twenty-three years, leaving an only brother, Sir Charles Metcalf Ochterlony, Baronet, her only next of kin. On the 30th of April, 1834, the deceased, when in London, with her own hand made her will, of which she appointed James George, John Edward Walcott, and John Ross executors. This will was deposited with Mr. George for safe custody; and the question is, Whether, under the circumstances of this case, that will is revoked? In November, 1834, the deceased went to lodge at the house of a Mrs. Bogle in Edinburgh, where she continued until her death. In April, 1835, it appears that she was attacked with a disease of the heart, of which she ultimately died; and her medical attendants directed that she should not be suffered to write or read, or attend to business, in order that she might not be agitated.

In the beginning of May, 1835, Mrs. Bogle, by the deceased's desire, wrote to Captain Walcott's wife at Bath requesting her to get her husband to write to Mr. George, directing him to destroy the deceased's will. Captain Walcott accordingly wrote to Mr. George, but he declined to destroy the will, but sent it to Captain Walcott that he might, if he thought proper, destroy it or forward it to Miss Ochterlony. Captain Walcott, it appears, on the 10th of June, enclosed the will in a letter to the deceased, which he forwarded by a lady who was going from Bath to Edinburgh, but the deceased died before the

to be admitted to probate. When, however, there are more testamentary documents than one, the presumptive admissibility to probate of the documents may be displaced, because it may be that there is a sequence in the dates of the execution of the documents, which, coupled with the words of the later documents, or the inferences to be drawn from those words, leads to the conclusion that the later document was intended as a revocation of the earlier, or, it may be, intended to revoke partially or to modify the earlier document, or, lastly, it may be that, apart from any question of revocation, the court has to deal with documents which are proved to have been executed on the same date and occasion, or which are undated, and as to which it is impossible to affirm that the one has any priority in time of execution over the other. In this last case, if the documents are so inconsistent that they cannot stand together, in my opinion probate becomes impossible, because the presumption of admissibility to probate of a testamentary document executed in accordance with the Wills Act is displaced." Vaughan Williams, L. J., in Townsend v. Moore, [1905] P. 66, 77. On the effect of a codicil as altering or revoking a legacy or devise in a will, see 11 Prob. Rep. Ann. 115, note; 1 L. R. A. (N. S.) 397, note.

"In construing a will and codicil it is the general rule that the disposition made by the will should not be disturbed further than is absolutely necessary to give effect to the codicil. The codicil revokes only so much of the will as is inconsistent with it." Carter, J., in Wardner v. Baptist Memorial Board, 232 Ill. 606, 611, 83 N. E. 1077, 1079, 122 Am. St. Rep. 138 (1908).

[7] The statement of facts is omitted.

will arrived. It appears that up to the time of her death, the deceased expressed her anxiety that the will should be destroyed, and stated to Mrs. Bogle that she would make a new will in order to revoke the former, but that Mrs. Bogle dissuaded her from so doing, informing her that as the will would be destroyed it was unnecessary to make a new one.

It is proved by Mrs. Bogle, that the letters were written by the deceased's direction, and that the passages relating to the destruction of the will were read over to and approved of by her. Now, although looking at the contents of the will, there was no reason to suppose that the deceased would depart from it; yet improbability must give way to facts, and there is no ground to suspect that Mrs. Bogle, who was ignorant of the contents of the will, had any interest or bias in respect to it.

The first question, therefore, on the facts she deposed to is, What was the intention of the deceased? There could be no doubt of her animus revocandi, and having established this point, what does the law require to give effect to such intention?

The Statute of Frauds provides that no will in writing of personal estate shall be repealed, nor any clause or bequest therein altered or changed by any words. Is this a revocation by words? I apprehend not. The deceased did not say, "I revoke my will," but in effect says, "Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it;" and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was; it was an absolute direction to revoke, reduced into writing in the deceased's lifetime. There is nothing in the Statute of Frauds which prevents such revocation having effect, and it is clear that, prior to that statute, a will might be so revoked. Further, the deceased subsequently directed a letter to be written to Mr. George, intimating that she would give her reasons thereafter, and evinced anxiety for a reply to that letter down to the time of her death; there can be no doubt that she died in the intention to revoke the will, and in the belief that it was revoked.

I am of opinion, that the will in this case is revoked, and that the deceased is dead intestate.[8]

[8] "By the act of 1789 no will or clause of any will is revocable but by a subsequent will or codicil or other writing executed according to the provisions of that act, or by concealing or destroying it. To say that a will, not signed by the testator or attested by three witnesses, could revoke a former will, would be to repeal the third section of that act." Evans, J., in Farr v. O'Neall, 1 Rich. Law (S. C.) 80, 88 (1844). For a case where a will was revoked by a witnessed writing not a will, see Toomer v. Sobinska, [1907] P. 106.

In Maharajah Pertab Narain Singh v. Maharanee Subhao Kooer, L. R. 4 Ind. App. 228 (1877), where it was held that a verbal direction given by a Hindu testator to a third party, to destroy his will, revoked the will, though the third person did not in fact destroy it, the court said (page 245) that the

HELLIER v. HELLIER.

(High Court of Justice, Probate Division, 1884. L. R. 9 P. D. 237.)

BUTT, J.[9] In this case the facts proved and the inferences to be drawn from them do not create much difficulty, but the question for the decision of the court is as to the legal consequences arising from those facts. A will was duly made by this testator in the month of April, 1864, by which he leaves the whole of his estate to his wife, the present plaintiff, who propounds the will, and he makes her sole executrix. It is also established by evidence that in the autumn of 1877 the testator executed in due form another will; and that that other will made, in part, a different disposition of his property. I do not think that there is evidence from which I ought to infer that there was any change of the executrix, or any revocatory clause in the second will, or any bequests wholly inconsistent with the first will.

Those being the facts, what is the conclusion that is to follow? I am of opinion that in the absence of any revocatory clause in the second will or a change of executrix, the second will, which is lost, cannot, unless the dispositions of the first will were wholly altered by it, be held to have revoked the first, and in my opinion there was no such alteration of the disposition of the property. This conclusion seems to me consistent with the interpretation that has already been put upon the judgment of the Privy Council in Cutto v. Gilbert, 9 Moo. P. C. 131, by Lord Penzance (then Sir J. Wilde) in the case of Lemage v. Goodban, Law Rep. 1 P. & M. 57. * * * I hold that the second will in this case, with the contents, as far as we know them, did not revoke the first. * * *[10]

SIMPSON v. FOXON.

(High Court of Justice, Probate Division. [1907] P. 54.)

On March 15, 1898, John Foxon made a will disposing of all of his property and appointing his daughter executrix. On September 11, 1903, he duly executed as a will a document on a printed form commencing: "This is the last and only will and testament of me, John Foxon." This document disposed of only a life insurance policy of £4. 13s. and appointed William Biggs executor. On April 11, 1905, he duly executed as a codicil a further document described as "a codicil to the last will." This codicil gave certain bequests, revoked all

only difference between the case before it and Walcott v. Oehterlory was "that the authority was given here by words, and there by a writing sufficient to satisfy the Statute of Frauds. In that case, as in this, the authority was not exercised by the actual destruction of the will."

[9] The statement of facts is omitted, and part only of the opinion is given.

[10] See Hitchins v. Basset, 2 Salk. 592 (1693).

previous appointments of executors and trustees, and appointed Herbert Simpson and William Biggs to be joint executors and trustees "of my will."

Sir GORELL BARNES, President.[11] There is no doubt to my mind that, as a matter of fact, the deceased cannot really have intended the policy form of will to have been a revocation of his general dispositions and to have left himself intestate as to the greater part of his property. I do not suppose that anyone, having these facts before him, could come to the conclusion that the deceased did so intend.

But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail. The principle has been very fully considered in a number of authorities. I think there is a good deal more authority than was stated to me in the arguments. The numerous authorities reported, such, for instance as Plenty v. West (1845) 4 Notes of Cases, 103, 1 Rob. 264, where the words in question were "this is the last will," arose out of some difference of opinion which existed in former days as to the effect to be given to those words, but which may safely be considered as set at rest by the later decisions. The words "the last will" would not revoke a former will, if not inconsistent with it; the last will might even tend to confirm what had gone before.[12] And so it is necessary to see what are the provisions in the last will, and if these provisions are inconsistent with those in the earlier document it may be that the later revokes the earlier one. But it does not necessarily follow that it always will do so if the two documents can stand properly together.

The principle to be generally applied in considering matters of this kind is very well stated in Lemage v. Goodban (1865) L. R. 1 P. & D. 57, at page 62, where Lord Penzance, quoting from Williams on Executors (6th Ed.) p. 156 (in 10th Ed. pp. 119, 120), says: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only, where they are inconsistent." The learned judge added: "This passage truly

11 The statement of facts is rewritten and abbreviated.

12 See Freeman v. Freeman, 5 De G., M. & G. 704 (1854); Lemage v. Goodban, L. R. 1 P. & D. 57 (1865); Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342 (1896); Fry v. Fry, 125 Iowa, 424, 101 N. W. 144 (1904).

represents the result of the authorities"; and he continued as follows: "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend?—not which, or what number, of papers did he desire or expect to be admitted to probate?—is the true question. And so this court has been in the habit of admitting to probate such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

That being the principle which seems to me applicable to the present case, I do not feel any difficulty in arriving at a decision upon it. In my opinion all three documents should be admitted to probate. I do not think, having regard to the circumstances which these testamentary papers disclose, that the words "last and only" can be taken as revoking what had been done by the previous will.

The document which contains the words in question is a printed form, evidently drawn up for the purpose of disposing of a policy of assurance only and appointing an executor to deal with that matter only. It is very unfortunate that it should have been drawn in this way, but it is, notwithstanding the words "and only," not intended to be a complete disposition of the testator's property.

If the other view were adopted it would lead to this, that apart from the insurance money, the whole of this man's property would remain undealt with, except as to what is disposed of by the codicil, although the testator cannot possibly have had any idea that he had not disposed or was not disposing of all that he could have dealt with.

The words "last and only" cannot be treated as an express revocation; and, applying the principles I have already referred to, the dispositions of this man's property seem to me to show that the document in question was not intended by him to be, and it is not, upon its face, a controlling and revoking disposition. In other words, neither by express intention nor by disposition of property can you gather that

the words "and only" are to be treated as a revocation of the earlier will.

I grant probate of all three documents.[13] The costs must, of course, come out of the estate.

SECTION 3.—REVOCATION BY BURNING, TEARING, CANCELING, OBLITERATING, MUTILATING, OR OTHERWISE DESTROYING

CHEESE v. LOVEJOY.

(Court of Appeal, 1876. 2 P. D. 251.)

This was an action to obtain probate in solemn form of the will, dated the 3d of July, 1849, of John Harris, who died on the 13th of May, 1876, with three codicils, one dated the 3d of July, 1849, and the two others the 21st of September, excluding from the probate all the alterations and interlineations appearing on the will.

That those instruments were originally well executed was not seriously contested. The plaintiff under the will was a beneficial legatee of a considerable part of the testator's personal estate and a devisee of a considerable part of his freehold estate. The heir at law and next of kin contended that the testamentary instruments had been revoked.

The evidence as to revocation was to the following effect: The will and codicils were at the testator's death found upon the kitchen table. The testator had drawn a pen through the lines of some part of the will, leaving the words perfectly legible, and had written on the back, "All these are revoked." A housekeeper, who had been nine years

[13] On the other hand, it seems that a later will, which does not contain an express revocation clause and does not dispose of the residue of testator's estate, may wholly revoke by implication earlier testamentary documents which disposed of the whole estate. See In the Estate of Ann Faith Bryan, [1902] P. 125.

"Where a second instrument is a will, as distinguished from a codicil, the courts do not make so great an effort to reconcile it with the former will as they do in the case of a codicil. The reason for this distinction lies in the fact that a codicil is ordinarily intended merely to effect some alteration in the will, leaving the rest of it in force; while a later will may quite as well be intended to dispose of testator's property in disregard of the former will." Page on Wills, § 269, p. 300.

Where several papers together constitute the last will, several sets of executors may be entitled to letters. For a case of that kind, see In the Goods of Strahan, [1907] 2 Ir. 484.

NOTE. On the pro tanto revocation of a holographic will by holographic interlineations and alterations, see La Rue v. Lee, 63 W. Va. 388, 60 S. E. 388, 14 L. R. A. (N. S.) 968 (1908), quoted from in note 1 to Milam v. Stanley, ante, p. 94.

with the testator and left in January, 1876, stated that she had heard the testator speak about his wills, and say he had made two or three; but that he had cancelled them and they were good for nothing, and that the testator had in her presence taken up this will and thrown it among a heap of waste papers on the floor. The housemaid deposed that she had first seen the document about eleven years ago in the testator's sitting room under the cushion on the sofa. That about seven or eight years ago the testator kicked it into a corner of the sitting room among a quantity of other papers, and that she took it out of the sitting room, where it was lying by the coal box along with other scraps of paper, and took it into the kitchen, where she put it on the table. That it was sometimes on the table, sometimes on the kitchen window, and sometimes on a chair, just where she chose to put it, but the testator never asked for it, nor was it produced to him again.

The judge, being of opinion that there was no evidence of revocation within the 20th section of the Wills Act, directed the jury to find a verdict for the plaintiff. The principal defendants excepted to this ruling in order to bring the case before the Court of Appeal.

JAMES, L. J. We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the court below: "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two."

BAGGALLAY and COTTON, L. JJ., concurred.

DOE d. REED v. HARRIS.

(King's Bench, 1837. 6 A. & E. 209.)

Ejectment for freehold lands. The lessor of the plaintiff claimed as the son and heir at law of John Reed and the defendant, the niece of John Reed, claimed as his devisee. The testator was an old and infirm man and the defendant lived with him as his housekeeper. While she exercised great influence over him they had frequent quarrels. The testimony of one Esther Treharne, the testator's servant, was that the testator threw the will on the fire, but that the devisee "scramped" it off; that the next morning the devisee pretended to burn the will in the testator's presence; and that, on being told by the witness that the latter doubted the burning of the will, the testator declared he would make another. The devisee swore that the day after the testator died she found the will in a trunk used by the testator for holding his deeds and papers. The will produced on the trial had no mark of fire and it did not appear that any envelope had been found upon it.

The plaintiff's counsel contended, first, that the testator had been

prevailed upon to execute the will by importunities of such a nature as to deprive him of his free agency; and, secondly, that, assuming the will to have been properly executed, the evidence showed a cancellation within the Statute of Frauds, 29 Car. II, c. 3, § 6. The learned judge stated to the jury, on the latter point, that, if they believed the evidence of Esther Treharne, and were satisfied that the testator threw the will on the fire intending to burn it, that Alice Harris took it off against his will, that he afterwards insisted on its being thrown on the fire again, with intent that it should be burned, and that she then promised to burn it, there was a sufficient cancellation within the statute. The jury found for the plaintiff, not stating the grounds of their verdict. In the ensuing term a rule nisi was obtained for a new trial, on account of misdirection on the two points above stated. It was also objected that the evidence of cancellation was not of a proper kind; the fact being proved only by declarations, and not by the testimony of eye-witnesses, or by marks of cancellation on the will itself.[14]

Lord DENMAN, C. J. The Statute of Frauds requires that a will shall be executed with certain solemnities; and, after prescribing these, directs how it shall be revoked; and that is by certain acts, which are specified. In the present case, there is no evidence that any one of those acts has been done. It is impossible to say that singeing a cover is burning a will within the meaning of the statute. The terms used in the sixth section show that to assert this would be going a length not contemplated in the statute. The acts required are palpable and visible ones. Cases may, indeed, be put where very little has been done, as a slight tearing and burning, and yet a revocation has taken place; but the main current of the statute is against the argument from such cases. The intention seems to have been to prevent inferences being drawn from such slight circumstances.

In Bibb dem. Mole v. Thomas, 2 W. Bl. 1043, the will was slightly torn and slightly burned: and the court said that the case fell within two of the specific acts described by the statute; there was both a burning and a tearing. Doubt might be entertained now whether the proof there given would be sufficient as to these; but, as the court considered what was done to have been a burning and a tearing, the case shows at least that they did not think the acts required by the statute could be dispensed with by reason of the conduct of a third party. In Doe dem. Perkes v. Perkes, 3 B. & Ald. 489 (S. E. C. L. R. 353) the testator's hand was arrested while he was in the act of tearing the will: he submitted to the interference; and the intention of revoking was itself revoked before the act was complete. There it was properly left to the jury to say whether the testator had done all he intended or not.

[14] The statement of facts is rewritten and abbreviated.

Neither of these cases at all approaches the present. It would be a violence to language, if we said here that there was any evidence to go to the jury of the will having been burned. Great inconvenience would be introduced by holding that there may be a virtual compliance with the statute; but there is none in saying that, if a testator perseveres in the intention of revoking his will, he shall fulfil it by some of the means pointed out in the statute; that he shall revoke the will, if not in his possession, by writing properly attested; or cancel it, if in his power, by some of the other acts which the statute prescribes.

Patteson, J. I am quite satisfied that I left this case wrongly to the jury. I did not see the distinction between the present case and Bibb dem. Mole v. Thomas, 2 W. Bl. 1043, as I ought. There something had been done which the court considered to be a burning and a tearing of the will. The testator is described, not as having merely done something to the corner of the will, but as having given it "something of a rip with his hands," and so torn it "as almost to tear a bit off." It is plain that, on the production of the instrument, it would appear (though I do not think that important) that there had been some tearing of the will itself. As the act says that there must be a tearing or burning of the instrument itself, a mere singeing of the corner of an envelope is not sufficient. To hold that it was so would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself. I do not say that a quantity of words must be burned; but there must be a burning of the paper on which the will is. I am quite satisfied that I was wrong in my direction to the jury.

Williams, J. We must give effect to a statute as providing for cases of ordinary occurrence, and not for any that may be put. It is argued that, if a testator throws his will on the fire with the intention of destroying it, and some one, without his knowledge, takes it away, that is a fraud which ought not to defeat his act. But so it might be said that, if the testator sent a person to throw it on the fire, and he did not, the revocation was still good. Where would such constructions end? The effect of them would be to defeat the object of the statute, which was to prevent the proof of a cancellation from depending on parol evidence. The will must be torn or burned; and the question will always be whether that was done with intention to cancel: how much should be burned, or whether the will should be torn into more or fewer pieces, it is not necessary to lay down.

Coleridge, J. The kind of construction which has been insisted upon would lead to a repeal of the statute on this subject, step by step. The statute, for wise purposes, does not leave the fact of cancellation to depend on mere intent, but requires definite acts. In the making of a will, if the proper signatures were not affixed, no explanation of the want of signatures could be received; and so, when a will has been made, to revoke it, there must be some act coupled with the intention of revoking, to bring the case within the sixth section. The question

is put, whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such an injury with intent to revoke as destroys the entirety of the will, because it may then be said that the instrument no longer exists as it was. Here the fire never touched the will. It can only be said that the testator's intention to cancel was defeated by the fraud of another party. But, to instance another case under the same clause of the statute, suppose the testator had written his revocation, and that, by the act of some other party, he had been prevented from signing, or the witnesses had been prevented from attesting it; could it be said that the testator had done all that lay in him, and therefore the act of revocation was complete? We must proceed on such a view of the statute as accords with common-sense. Rule absolute.[15]

GILES v. WARREN.

(Court of Probate, 1872, L. R. 2 P. & D. 401.)

Lord PENZANCE.[16] I think in this case there was no revocation. The fact that a testator tears or destroys his will is not itself sufficient to revoke one properly executed. That is to say, the bare fact. If, for instance, he tears it, imagining it to be some other document, there would be no revocation, for there would be no animus revocandi. He must intend by the act to revoke something that he had previously done. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is a term applicable to the case of a person cancelling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he

[15] See White v. Casten, 46 N. C. 197, 201, 59 Am. Dec. 585 (1853), where the court said: "The principle which we would extract from the cases cited, is that, where the revocation of a will is attempted by burning, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol, appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burnt or singed, it is sufficient to revoke the will." That the testator is deceived into thinking that he has burned up the will, when in fact it remains intact, will not enable the court to find a revocation. Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339 (1891). But see Pryor v. Coggin, 17 Ga. 144 (1855). In Doe d. Reed v. Harris, 8 A. & E. 1 (1838), between the same parties as in the principal case, it appeared that the paper in which the will was wrapped partially burned when the testator threw the will on the fire, but that the will itself was not affected. In this second case, however, copyhold lands were sued for, and as the Statute of Frauds did not apply to them, and as in consequence a revocation at common law, "which only requires evidence of intention," was sufficient, the heir at law recovered the copyholds. That the principal case was correctly decided under the Statute of Frauds provision was not controverted. On revocation at common law, see Brook v. Warde, ante, p. 229, and Card v. Grinman, 5 Conn. 164 (1823).

[16] The statement of facts is omitted.

sets about to destroy it. According to the evidence the testator, in consequence of some conversation he had with Hillstead, was under the impression that he had made no valid will, and, as being useless, he tore the document up and threw it on the fire. That is no revocation. What happened afterwards was not material. If the will had been once revoked, the testator could not set it up again by subsequent declarations.[17]

DOE d. PERKES v. PERKES.

(Court of King's Bench, 1820. 3 B. & Ald. 489.)

Ejectment for messuages and lands in the parish of Walsall. Plea, Not guilty. At the trial before Holroyd, J., at the last assizes for the county of Stafford, it was admitted that the lessor of the plaintiff, as the brother and heir at law of one Charles Perkes, deceased, was entitled to recover, unless the defendants could establish the will under which they claimed. The will had been duly executed by the testator to pass real property, and the only question was, whether he had not revoked it by tearing it, and upon that point it was proved by one Joseph Worrall, that in August, 1816, the testator, having had some quarrel with one of the parties who was a devisee named in his will, in a fit of passion, took his will out of his desk, and said to Worrall: "Joe, you shall see if I have done anything for the rascal or not. I have made him a gentleman." He then began to tear the will, and tore it twice through; the witness then laid hold of his arms and entreated him to abate his passion. The devisee then, who was present, put his hands together, as if in an attitude of prayer, and said: "Consider my family. I beg your pardon for what I have said. Had I been worthy to have known what had been done for me, I should have been satisfied." Upon this, the testator became calm, and the witness let loose his arms. The testator then folded up the will, and put it in his pocket, and afterwards pulled it out again, and said, "It is a good job it is no worse," and after fitting the pieces together, he added, "There is nothing ripped that will be any signification to it." The will was found after the death of the testator, in four parts. Upon this

[17] See Estate of Olmstead, 122 Cal. 224, 229, 230, 54 Pac. 745 (1898). That a destruction cannot be ratified, so as to make it a revocation, see Clingan v. Mitcheltree, 31 Pa. 25 (1856); Mundy v. Mundy, 15 N. J. Eq. 290 (1858); Gill v. Gill, [1909] P. 157. In the last case Bargrave Deane, J., said that, "if a testator under such circumstances desired that the act of destruction performed without his authority at the time should prevail, he had it in his power effectually to revoke his will in accordance with the provisions of the Wills Act. He could either execute a document expressly revoking his will, or he could make a fresh will dealing with his property in any way he chose. In the present instance, so far from doing anything of the sort, the testator always treated the act of destruction by his wife rather as a joke and as of no effect in law; and he was right." Id. 161, 162. But see Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209, 89 Am. St. Rep. 854 (1902); Parsons v. Balson, 129 Wis. 311, 109 N. W. 136 (1906).

evidence, the learned judge left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he intended. The jury found a verdict for the defendants, establishing the will; and now

W. E. Taunton moved for a new trial.

ABBOTT, C. J. Upon the evidence, it appears, in the present case, that the testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no farther, and after having fitted the pieces together, and found that no material word had been obliterated, he said, "It is well it is no worse." Now, if the cancellation had been once complete, nothing that took place afterwards could set up the will. But it was a question for the jury to determine whether the act of cancellation was complete. They have found that it was not, and that it was the intention of the testator, if he had not been stopped, to have done more, in order to carry his purpose into effect. I can see no reason to think that verdict wrong.

BAYLEY, J. I think this verdict right. If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped in medio, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here, there was evidence from which a change of purpose before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict.

HOLROYD, J. I was of opinion, at the trial, that if the act of tearing was completed nothing that took place afterwards was sufficient to set up the will again. The Statute of Frauds says "that no devise in writing of lands shall be revocable, otherwise than by some other will, or by burning, cancelling, tearing, or obliterating the same by the testator," etc.; but, in order to effect this, the act of tearing, etc., must be complete. I left it to the jury to say, whether that was so, and they were of opinion, that the testator had not completed the act he had intended, and I thought that they drew the right conclusion from the evidence.

BEST, J. I am of opinion, that the verdict is right. Tearing is one of the modes by which a will may be cancelled; but it cannot be contended that every tearing is a cancellation: for if it were, a testator, who took his will into his hands with intent to tear it, must, if he should tear it in the smallest degree and then stop, be considered as

having cancelled it. The real question in these cases is, whether the act be complete. If the testator here, after tearing it twice through, had thrown the fragments on the ground, it might have been properly considered, that he intended to go no farther, and that the cancellation was complete; but here there is evidence, that he intended to go farther, and that he was only stopped from proceeding by an appeal made to his compassion by the person who was one of the objects of his bounty. The case in Blackstone is very distinguishable; for there the testator completed his purpose, although the will was not destroyed. I see no reason, therefore, for disturbing the verdict.

Rule refused.[18]

In re GOODS OF MORTON.

(High Court of Justice, Probate Division, 1887. L. R. 12 P. D. 141.)

Henrietta G. Morton, late of Newcastle-on-Tyne, deceased, died January 26, 1887, having duly executed a last will, bearing date September 16, 1853. After her death the will, which had remained in her possession, was found in a trunk with the signatures of the testatrix and the attesting witnesses scratched out as if with a penknife. At the bottom of the will there was a memorandum in the handwriting of the deceased, dated "November, Saturday, 1861," but not executed, whereby for reasons given the will was declared to be canceled.

Searle, moved for a grant of administration to Sarah Francis Morton, the sole surviving sister and next of kin of deceased, as in case of intestacy.

BUTT, J. I do not think there is any difficulty in the case. What the testatrix did may be regarded as a lateral cutting out. The paper is not pierced, but the signatures are scratched away. I think the will has been revoked, and I grant administration to the applicant.[19]

[18] See Elms v. Elms, 1 Sw. & Tr. 155 (1858).

[19] In Hobbs v. Knight, 1 Curt. 768 (1838), where it was held that, by cutting out his signature to the will with the intent to revoke, the testator thereby revoked his will either by tearing or by destroying it within the meaning of the Wills Act, the court (Sir Herbert Jenner) said: "The signature of the testator being, as I before said, an essential part of a will, it is difficult to comprehend when that which is essential to the existence of a thing, is destroyed, how the thing itself can exist. There can be no doubt that if the name of the testator had been burned or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. If this were not the case, it would lead to many absurd consequences. But it has been argued, that as the present act of Parliament has pointed out certain modes with regard to the revocation of wills, the court cannot go beyond the express terms of the act; that the words being confined to burning, tearing, or otherwise destroying, omitting the terms 'obliterating' and 'canceling' used in the Statute of Frauds; there must be an actual burning or tearing, or as to 'otherwise destroying', that the whole instrument must be destroyed; that the cutting, in the present case, is not tearing—(burning is out of the question)—and the instrument not being destroyed, that there is no revocation: and upon this part of the argument, the case of Doe

GAY v. GAY.

(Supreme Court of Iowa, 1882. 60 Iowa, 415, 14 N. W. 238, 46 Am. Rep. 78.)

This is a proceeding at law to set aside the probate of a will of Harvey D. Gay. The petition alleges that the instrument in question was at one time the last will of Harvey D. Gay, but that during his life-time he destroyed it by crossing his name, and by cutting and tearing the same with intent to revoke and destroy the will, and that since that time it has not been of any force or validity. The cause was tried to a jury, and the court directed them to find that the will was not revoked. The plaintiff appeals.

DAY, J. Harvey D. Gay died in July, 1878. Some time after his death his widow, Virginia Gay, discovered a package of papers in the secretary in the back parlor. Soon thereafter she gave the papers to Mr. Hawkins, the administrator of the estate. About the last of Au-

dem. Reed v. Harris, 6 Ad. & Ell. 209, 1 Nev. & P. 405, in the Queen's Bench, was referred to, in which the testator had thrown his will on the fire, with the intention of destroying it, and a part of the cover was burnt, but there being no burning on the instrument itself, the judges of that court held that the will was not revoked; that the words of the Statute of Frauds had not been complied with. But that case is not applicable to the present point, for here a part of the will, the most essential part, is removed, and if in that case the name of the testator had been burned or torn off, I think the Court of Queen's Bench would have held that to be an effectual revocation by burning or tearing, for, according to the judgment in that case, it was not required that the whole will should be burned or torn. The learned judges do not say how much it is necessary should be burned, but Mr. Justice Coleridge says it is sufficient, if the entirety of the will is destroyed; his expressions are these: 'We were pressed with the argument: Must the whole of the document be destroyed? I say no; but there must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator.' So I say here, Is not the entirety of the will destroyed by the removal of the signature of the testator?. It is true this is not an act of tearing, in the strict sense of that term; but, if the circumstances of this case required it, I think it would not be difficult to show that a will might be revoked by cutting with an instrument as well as by tearing, if a corresponding effect be produced by the one act as by the other. The Latin equivalent for the verb 'to tear,' is lacerare, but I find, upon looking into the dictionaries, that exscindere, 'to cut out,' is also used in the sense of 'to tear,' and Cicero uses the phrase 'exscindere epistolam' (which is remarkable), with regard to the destruction of a document. But it is unnecessary to enter further into the consideration of this point, for, consistently with the true construction of the act of Parliament, and the decision of the learned judges of the Court of Queen's Bench, it is not necessary, in order to bring the act within the meaning of the words 'otherwise destroying,' that the material of the will should be destroyed; it is sufficient, as it appears to me, if the essence of the instrument (not the material) be destroyed. Suppose a will to be written in pencil, and the words were removed by means of Indian rubber; could there be any doubt that that would be a sufficient revocation? Cutting is a mode of destroying as effectual as tearing, and it appears to me that if tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to the act of cutting it; what would be the consequences of a different construction? Suppose a will were torn into two or more pieces, the will, no doubt, would be revoked; but if it were cut into twenty pieces with a knife, that would be no revocation, and if the pieces could be collected and

gust, 1880, the administrator, in looking over these papers, which consisted chiefly of canceled mortgages, found the paper in question, purporting to be the last will of Harvey D. Gay. When found, two scrolls were drawn with a pen lengthwise along the signature, but not in such manner as to obliterate it or render it illegible. The will was then filed in the office of the clerk of the circuit court for the purpose of probating it. Some time thereafter the deputy clerk, in unfolding the will, tore the right-hand margin to the depth of one-eighth or one-fourth of an inch. This tear communicated with and opened a cut just over the signature, about two or three inches in length. When this cut was made does not satisfactorily appear, but the evidence shows that it was not made entirely through the paper, and that it was not visible until it was opened by the deputy clerk.

1. The determination of the question involved will be greatly facilitated by considering the state of the law upon the subject prior to the adoption of the statute under which the question arises. By the sixth

pasted together, the will must be pronounced for by the court. I cannot conceive it possible that it was the intention of the Legislature to leave the law in that state. The question then comes to this: whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a will, and that if that name be removed, the essential part of the will is removed and the will is destroyed; otherwise the statute does certainly not deserve the title it bears, namely, 'An act to amend the laws with respect to wills.' It was said in the argument (perhaps it is not very material) that a will cannot now be revoked by obliteration, the term 'obliteration' having been advisedly omitted by the Legislature; but I am not prepared to say (although I now merely throw this out) that a will may not be revoked in that way, for I see no reason why, if the obliteration amount to a destruction of the will (that is, if the name of the testator, which is essential to a will, be so obliterated that it cannot be made out), a will may not be revoked in that way as well as any other. Suppose a testator had so obliterated his name from a will as to render it impossible to make it out, and I am not at liberty to supply it by evidence aliunde, how would this operate with respect to the 21st clause of the act, which enacts, 'that no obliteration, interlineation, or other alteration, made in any will after the execution thereof shall be valid, or have any effect, except so far as the words, or effect of the will before such alteration, shall not be apparent'? By this clause, as I understand it, where words are so obliterated that they do not appear, it is a good revocation pro tanto. Would not the same rule be applied with respect to the name of the testator? I think that it was the intention of the Legislature that it should be sufficient if the name of the testator was so obliterated that it could not be made out; it never could be intended that a testator might revoke his will pro tanto, and yet not be at liberty to revoke the whole will." The court also expressed the opinion that "if the names of the attesting witnesses were erased by the testator animo revocandi, it would be a sufficient revocation. It might be difficult to make it appear that the names of the witnesses were erased animo revocandi; but if it could appear, I should be of opinion that it would amount to a destruction of the will, within the meaning of the act of Parliament. I do not think that the words 'otherwise destroying' mean that the material of the will must be destroyed, but that it must be something which would amount to a destruction of the will itself." That tearing off a seal to revoke is a revocation, see Price v. Powell, 3 H. & N. 341 (1858). Merely removing pins which fasten the sheets of the will together, without otherwise injuring the sheets, is held not to be a tearing. Woodruff v. Hundley, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145 (1900).

section of the statute of frauds (29 Car. II, c. 3) it is provided that the revocation of a will by injury to the instrument itself can be effected only "by burning, canceling, tearing, or obliterating the same by the testator himself, or in his presence, and by his direction and consent." Under this statute it was held that to constitute a revocation of a will by burning there must at least be a burning of a part of the paper on which the will is (Reed v. Harris, 8 Adol. & E. 1), and that a very slight act of tearing and burning is sufficient to effect a revocation, if done with such intention (Mole v. Thomas, 2 W. Bl. 1043); that when a pencil, instead of a pen, is used for cancellation, the revocation is not necessarily ineffectual, and it may be shown that it was intended to be final (Mence v. Mence, 18 Ves. 348; Frances v. Grover, 5 Hare, 39); and that, in order to constitute a revocation by obliteration, it is not essential that every word shall be obliterated, the revocation being complete if enough of the material part be expunged to show an intention that the devise shall not stand, as where the testator draws his pen across the devisee's name (Mence v. Mence, 18 Ves. 350; 1 Jarman, Wills, 129–135).

The act 1 Vict. c. 26, provides that the revocation of a will, by injury to the instrument itself, shall be only "by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." This statute, it is to be observed, omits the words "canceling or obliterating," found in the statute of frauds, and substitutes therefor the words "otherwise destroying." Under this statute it has been held that the words "otherwise destroying" are to be taken to mean a destruction ejusdem generis with the modes before mentioned—that is, destruction, in the proper sense of the word, of the substance or contents of the will, or at least complete effacement of the writing, as by pasting over it a blank paper (Re Horsford, L. R. 3 P. & D. 211), and not a destroying in a secondary sense, as by canceling or incomplete obliteration (Stephens v. Taprell, 2 Curt. 458; Hobbs v. Knight, 1 Curt. 779); that cancellation and obliteration, unless they prevent the words as originally written from being apparent by looking at the will itself, are plainly excluded by the statute (Re Dyer, 5 Jur. 1016; Re Fary, 15 Jur. 1114); and that glasses may be used for discovering what the words obliterated originally were (1 Jarman, Wills, 142, and cases cited). Chapter 162 of the Revised Statutes of the territory of Iowa, § 9, respecting the revocation of a will by injury to the instrument cited, provides that "no will, nor any part thereof, shall be revoked unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction." This, it will be observed, is identical with the statute. 29 Car. II, c. 3.

In the Code of 1851 the provisions of our present statute were adopted as follows:

"Section 1288. Wills can be revoked, in whole or in part, only by being canceled or destroyed by the act or direction of the testator with the intention of so revoking them, or by the execution of subsequent wills.

"Section 1289. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will."

Revision, §§ 2320, 2321; Code 1873, §§ 2329, 2330.

When a statute provides the manner in which a will may be revoked, that manner must be pursued. Wright v. Wright, 5 Ind. 391; Runkle v. Gates, 11 Ind. 95; Blanchard v. Blanchard, 32 Vt. 62; Gains v. Gains, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375; Clingan v. Mitcheltree, 31 Pa. 25; Reed v. Harris, 6 Adol. & E. 209. Our statute provides that a will may be revoked, in whole or in part—First, by being destroyed; second, by being canceled—the cancellation being witnessed in the same manner as the making of a new will. If the scroll drawn over the name of the testator had entirely obliterated the signature, this might have worked a destruction of the will, upon the ground that it had destroyed that without which the will could not exist. See Hobbs v. Knight, 1 Curt. Ecc. Rep. 768; Price v. Powell, 3 Hurl. & N. 341; The Goods of Harris, 3 Sw. & Tr. 485; Goods of Gullan, 1 Sw. & Tr. 23; Goods of Coleman, 2 Sw. & Tr. 314. In this case, however, the scrolls drawn across the signature of the testator do not obliterate it nor render it illegible. They do not, therefore, constitute a destruction of the will. See Re Dyer, 5 Jur. 1016; Re Fary, 15 Jur. 1114; Re Brewster, 6 Jur. (N. S.) 56; Lushington v. Onslow, 12 Jur. 465; Stephens v. Taprell, 2 Curt. 458; Re Beavan, 2 Curt. 369; Re Ibbitson, 2 Curt. 337; In the Goods of Horsford, L. R. 3 P. & D. 211.

It is insisted by the appellant that as the statute provides for the partial revocation of a will by its being destroyed, the word "destroyed" cannot mean annihilated, but is sufficiently answered by what was done in this case. It is apparent, however, that there may be a destruction of a particular part of a will by erasure or complete obliteration; and that, admitting that "destroyed" does not, as used in the statute, mean annihilated, it does not follow that a will may be destroyed by simply drawing a scroll through the signature. The most that can be said for what was done in the present case is that it constitutes a cancellation of the signature not rendering it illegible, and as it was not witnessed in the manner required by section 2330 of the Code, it is inoperative. The court did not err in directing a verdict for the defendant.

2. The plaintiff introduced as a witness one Paul Carrell, and offered to prove by him that in the early part of 1878 decedent had a conversation with the witness in which he went over the question of his property, and in his conversation, referring to the terms of what he claimed to have been his will, said that he had destroyed it; that the law would make a proper distribution of his property to suit him;

and that his wife would now get under the law what she would have got under the old will, and that he had destroyed his will and should not make another.

The plaintiff also introduced one Kennedy, and offered to prove by him that he had a conversation with Mr. Gay, about two weeks prior to his death, with reference to the disposition of his property, in which he said that he had destroyed his will; that he had made a will at one time, but had since destroyed it; that at the time he made his will he desired his wife to have all the property he had; that since that time his property had more than doubled, and that now, if he should die, his wife would get as much as she would at the time he made his will, if she had got it all; that he did not propose to go back on his mother; that he ought to do something for her; and that he had destroyed his will and should not make another. The defendant objected to this testimony, and the objection was sustained. The appellant assigns this action of the court as error. The statute requires that the act of destruction or cancellation, which will work a revocation of a will, must be done with the intention of revoking it. When the act is sufficient to work a revocation, if done with that intent, the declarations of the testator may be admissible to show the intent. See Bibb v. Thomas, 2 W. Bl. 1043; Harring v. Allen, 25 Mich. 505; Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460.

When, as in this case, however, the act done does not amount to a revocation, the declarations of the testator are not admissible to prove a revocation. Redf. Wills, 331; Staines v. Stewart, 8 Jur. (N. S.) 440; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Shallcross v. Palmer, 16 Q. B. 747; Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390.

The court did not err in rejecting the proffered testimony. Affirmed.[20]

[20] In Townshend v. Howard, 86 Me. 285, 29 Atl. 1077 (1894) the court said: "A will can be revoked in whole or in part by cancellation or obliteration. Rev. St. c. 74, § 3. To cancel is to cross out. To obliterate is to blot out. The former leaves the words legible. The latter leaves the words illegible. By either method a will can be legally revoked in whole or in part. If that which is essential to the validity of the whole is canceled or obliterated, animo revocandi, the whole will is revoked. If only a single clause is so canceled or obliterated, then that clause only is revoked. And such cancellation or obliterations are as effectual when made with a pencil as when made with a pen. * * * In the present case, the signatures of the testator are all erased. The testator had signed the will in three places, at the bottom of the first page, at the bottom of the second page, and at the end of the will on the third page. These signatures are all erased with a lead pencil; and the evidence satisfies us that they were erased by the testator himself, animo revocandi. * * * It is the opinion of the court, upon the whole case, * * * that the will offered for probate be disallowed." On pencil erasures, see, also, Hilyard v. Wood, 71 N. J. Eq. 214, 63 Atl. 7 (1906); In re Frothingham's Will (N. J. Prerog.) 71 Atl. 695 (1908); Id. (N J.) 74 Atl. 471 (1909); McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71 (1904).

In Evans' Appeal, 58 Pa. 238, 244 (1868), the court said: "It is true we have to do with the meaning of the words 'canceling' 'obliterating' and 'de-

In re KISSAM'S WILL.

(Surrogate's Court, Westchester County, 1908. 59 Misc. Rep. 307, 110 N. Y. Supp. 158.)

MILLARD, S. The last will and testament of Harriet Kissam, executed and attested in manner prescribed by law, has been presented for probate. It is accompanied by an instrument in writing, duly ac-

stroying' as used by the Legislature, but there is nothing in the statute that requires us to attach to them any unusual signification. Let it be admitted that, collocated as they are, we are required to consider them as defining acts of a similar nature. We do. All are acts done to the will itself and they are not used in their absolutely literal sense. Even burning does not mean entire consumption by fire. * * * Nor is obliteration, as meant in the act, nothing short of effacing the letters of the will, scratching them out or blotting them so completely that they cannot be read. A line drawn through the writing is doubtless obliteration though it may leave it as legible as it was before. So the destruction spoken of is not necessarily annihilation, or a change into other forms of matter. Tearing into fragments is unquestionably destruction, though the fragments may be reunited. All the words are used in their popular sense, and thus used they secure the object the Legislature had in view, a complete manifestation of an executed intention to repeal. Each word is expressive by an act done to the paper itself, a mark upon it, evincible of a present intent that it shall not operate as a will. Revocation by cancellation then is not to be understood to mean exclusively drawing crossed lines upon the paper, but it means any act done to it which, in common understanding, is regarded as cancellation when done to any other instrument."

In Estate of Olmsted, 122 Cal. 224, 230, 54 Pac. 745, 746 (1898), the court said: "One of the recognized modes of revoking a will is by cancellation. In its primal significance the word means a lattice work. As applied to writings, it means the nullification of a writing by drawing upon its face lines in the form of lattice work 'crisscross.' Usually in legal as well as in common acceptance cancellation is accomplished by the drawing of any line over or across words with the intent to nullify them."

In Woodfill v. Patton, 76 Ind. 575, 40 Am. Rep. 269 (1881), where the statute provided "that no will should be revoked unless the testator should destroy or mutilate the same," the court said: "The destruction of a will did not, at common law, imply a ruin of the paper or parchment on which the words were written. It meant taking from the instrument force and effect. * * * We think the erasure of the testator's signature, designedly and deliberately made, accompanied, of course, by the intention to revoke, must be deemed a 'destruction' of the will. It is not necessary that there should be a destruction, in a literal sense, of the fabric upon which the words of the testator are written. * * * 'Mutilate' means something less than total destruction. Mere mutilation of a will would not, of itself, take from a will all legal force. A mutilation, however, which takes from the instrument an element essential to its validity, would have the effect to revoke it. To mutilate, in the sense in which it is generally used by law writers and by judges, means to render imperfect. *, * * Purposely taking from a will the signature of the testator deprives it of an essential part, and makes it so imperfect as that it loses all legal force and effect. The manner in which the mutilation or destruction is effected is not of controlling importance. If the signature were cut or torn from the paper; if all traces were removed by a chemical preparation, there would be no room for controversy, it would plainly be a mutilation of the will. It cannot be any the less a mutilation if the signature is marked out with pen, pencil or other implement which erases, cancels or obliterates."

On the burden of proof in regard to alterations appearing on the face of the will see 17 L. R. A. (N. S.) 184, note.

knowledged, executed by all the heirs at law, and next of kin of decedent, waiving the issuing and service of citation, and consenting that will be admitted to probate. It appears by an examination of the will, which is typewritten, that a part of the second clause has been erased. The statute directs that the surrogate "before admitting a will to probate must inquire particularly into all the facts and circumstances, and must be satisfied of the genuineness of the will and the validity of its execution." Code Civ. Proc. § 2622; Matter of Bartholick's Will, 141 N. Y. 166, 172, 36 N. E. 1.

Inquiry into the facts and circumstances by examination of two credible witnesses, the scrivener, who also was one of the subscribing witnesses, and the testatrix's sister, to whom testatrix read the will after it was executed, clearly and distinctly establishes that, at the time of the execution and attestation of the will, the second clause thereof read, "Second, I give and bequeath, subject to said life estate, to Mrs. Lillian Roome and Miss May A. Husted, of Washington, D. C., each, the sum of five thousand (5,000) dollars;" and that thereafter the testatrix altered such second clause by erasing the words "and Miss May A. Husted" and the word "each."

The testatrix could not by such erasure alter her will. It is provided by 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 42, that "No will in writing, nor any part thereof * * * shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration and executed with the same formalities with which the will itself was required by law to be executed." The effect of this statutory provision is to prevent a testator from altering his will, otherwise than by an instrument executed in the same manner as required to give it effect as a will. The statute has surrounded the execution of testamentary instruments with certain forms and ceremonies as a shield and protection against fraud and imposition, and the purpose of such precautionary measures might be entirely defeated, if held only to the original execution, leaving all subsequent alterations to be made without such protection. The aim of the statute is to close the door against opportunities of fraud and alterations in a will except by the observance of the same formalities as in its execution.

In Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254, it appears that after will was executed, the testatrix obliterated clauses numbered "2nd" and "4th" with intent to revoke the same. Held, that the obliteration was not effectual for that purpose, and that the will remained in full force and effect as before. In Quinn v. Quinn, 1 Thomp. & C. 437, after will was executed, the testator made alterations by erasing and interlining. Held, that the testator could not by an erasure partially revoke his will, and that will should be probated as originally written. In Stevens v. Stevens, 6 Dem. Sur. 262, 3 N. Y. Supp. 131, the testatrix, after the execution of her will, attempted to alter it by having a bequest written on a separate piece of paper and pasted on

the will, cutting the latter in two for that purpose. Held, that the attempted bequest was ineffectual, and that the original will was not rendered invalid. In Matter of Carver's Estate, 3 Misc. Rep. 567, 23 N. Y. Supp. 753, it was held that the effect of an unauthenticated erasure in a will made after execution is to render the change sought to be made inoperative, leaving the will to stand in form and effect as before the alteration was attempted. In Matter of Lang's Will, 9 Misc. Rep. 521, 30 N. Y. Supp. 388, it was held that alterations and erasures made after the execution of a will will not invalidate it if the original intention of the testator can be ascertained. In Matter of Prescott, 4 Redf. Sur. 178, it was held that where a testator, after the execution of his will, makes erasures and interlineations therein, without intending to revoke the will, and without re-executing the same, the will must be admitted to probate as originally executed. In Dyer v. Erving, 2 Dem. Sur. 160, it was held that after one has signed and published an instrument, as and for his last will, though he may revoke it by destruction, or annul or modify it by another writing executed with due formalities, he cannot otherwise vary its terms by additions, interlineations, obliterations, or erasures on its face. In Matter of Westbrook's Will, 11 Misc. Rep. 339, 89 N. Y. Supp. 862, will after execution was altered by cutting out its first subdivision and fastening together the remaining parts; the piece cut out could not be found. The scrivener who was also one of the subscribing witnesses testified as to the missing clause, which the court held was sufficient proof of that portion and admitted will to probate as originally executed.

It being the duty of the surrogate to admit a will to probate as executed, and to disregard alterations made without formalities prescribed by statute, it necessarily follows that the Surrogate has power to take proof of the provisions of the instrument before alteration. A decree will be entered admitting will to probate as originally written and executed.

In re GOODS OF BRASIER.

(High Court of Justice, Probate Division. [1899] P. 36.)

Motion on behalf of the administrator with the will annexed of Thomas Brasier, late of Castle Cottage, near Gatacre, in the parish of Claverley, Shropshire, who died on January 9, 1897, that certain erasures and alterations in the will might be filled up by the restoration of names alleged to have been originally written therein.

The will consisted of three testamentary documents, the first prepared by a solicitor and dated March 27, 1874, appointing executors and leaving real and personal property among the testator's wife Hannah and his three sons, Daniel, Charles, and Thomas Ash Brasier, and constituting his wife residuary legatee; the second, a codicil dated December 21, 1881, appointing other executors; the third, a holograph

will dated June 4, 1884, and appointing executors from the probate of which the following is an extract:

"I give and bequeath to my son Charles Brasier the house and stable and all the lands at the Broad Lanes for him and his heirs and assigns forever, I give and bequeath to my son, Thomas Ash Brasier the cottage and garden and land at the Broad Oak in the parish of Claverley in the county of Salop, I give and bequeath the cottage and garden at the Broad Lanes to my son ——— Brasier for him and his assigns for ever, I give and bequeath to my son ——— Brasier the cottage at Portobello near Wolverhampton in the county of Stafford, and I leave unto ——— Brasier three hundred pounds in money at my decease."

The blanks contained names which appeared to have been written over erasures.

Mr. T. H. Gurrin, an expert in handwriting, deposed that he had examined the will with a powerful magnifying glass, and found that these names, which were respectively "Daniel," "Thomas," and "Thomas," had been altered, and that the name originally written was in each case "Daniel."

The surviving attesting witness was unable to state whether the alterations had been made when the will was executed.

All the executors were dead. The testator's wife and three sons survived him, but she and Thomas Ash Brasier had since died.

The applicant was Daniel Brasier, who had obtained the consent of Charles Brasier, and that of the widow of Thomas Ash Brasier. It did not appear whether Hannah Brasier or Thomas Ash Brasier had made a will.

Priestley, in support of the application. The word "Daniel," being visible to an expert using a magnifying glass, is "apparent" within the meaning of section 21 of the Wills Act, and should be substituted in the blank spaces.

GORELL BARNES, J. An order may be made in the terms of the motion, on proof being given to the registrar that all the persons interested in the estate are before the court.[21]

21 "In the present case I am satisfied that the words in question may be read by an expert, by the means only of placing an opaque substance, such as a piece of brown paper, round the passages in question, when the page is held against a window pane. These means appear to me to fall well within those permitted by the authorities I have mentioned. If it is permissible to use a magnifying glass, I presume of any strength, and, I should suppose, with or without the additional employment of a lens, by which the light upon the object might be concentrated, which are all artificial means, a fortiori, as it seems to me, is it allowable to place a piece of brown paper round an object on which it is desired to discern writing. That is not to resort to artificial means at all. The rays from the object are not deflected, and there is no concentration of light upon it. All that is done is to exclude superfluous light, and the action of thus using a piece of paper appears to me not to differ in principle from the action of a man who shades his eyes in sunshine to look at a landscape, or of a man who forms his hand into a tube

In re GOODS OF SAVAGE.

(Court of Probate, 1870. L. R. 2 P. & D. 78.)

John Savage, late of Beaufort Buildings, Bath, died on the 9th of January, 1870, leaving a duly executed testamentary paper in the following terms:

"This is a codicil to my will. After the death of my dear wife, save and except the Colly estate, containing 300 acres more or less, I give all the land I have in the parish of Tetbury, to my son William, absolutely, and I also give to my son William the Vale of Neath Debenture Stock, value £1000, to cover the bond I have given to Robert Holdsworth and Francis Savage, my son, as trustees of his marriage settlement, for securing the sum of £600 and interest. Witness my hand this 2nd day of August, 1869, at Mappowder, Dorsetshire.

"Signed by the said John Savage as a codicil to this will, in the presence of us, etc. James William James, farmer, Mappowder; Charles Giles, groom, Mappowder."

The following facts were disclosed in the affidavits: On the 2d of August, 1869, the deceased being then at Mappowder, in Dorsetshire, handed to his son, Rev. William Savage, a sealed envelope, and told him to keep it. Rev. W. Savage retained possession of the envelope until the testator's death, and it was then opened, and the codicil was

the better to enable him to see a picture. The argument addressed to me against this view turns upon what, I think, is a mistaken interpretation of the words 'on the face of the instrument,' employed in the judgments from which I have quoted. It is said that, in this case, the words in question are not 'apparent' on the face of the instrument, but are made apparent only by transmission of light through the back of the document, and by the words being exhibited against that light. But I do not think that in using the words 'on the face of the instrument' the judges, who have employed them, intended to draw any distinction between seeing the front of the document, with no light behind it, and seeing the document with light transmitted through it. They were drawing a distinction between what could be seen to be the contents or effect of the instrument, as against what could be inferred to be its language from extrinsic evidence. To some extent, the use of the phrase appears to me metaphorical, much as one says that a pleading is good or bad on the face of it. I am by no means sure, however, that even in the strictest sense of the words the writing in question is not apparent 'on the face of the instrument,' when it is read in the way in which it can be read in this case. The watermark on foolscap, though generally illegible, if the paper be laid on a table, becomes clear when the paper is held up to the light. It appears to me that in that case the words or date of the watermark are not only apparent, but apparent on the face of the paper. When an illuminated clock is seen at night, I think that the hands and figures are apparent, and apparent on the face of the clock. Can it be said that, on the moment of the clock being lighted, they cease to be apparent on its face, and become apparent on something else, or on nothing? But even if the writing in question can in this case properly be said not to be 'apparent on the face of the instrument,' I must remark that the act of Parliament itself speaks of words being 'apparent,' and that to insist on their being apparent 'on the face of the instrument,' in the sense sought to be attributed to the phrase, is to put a gloss on the language of the act." Finch v. Combe, [1894] P. 191, 202–203.

found in it. No will or other codicil could be found, but there was an unexecuted testamentary paper dated in the year 1869. In December, 1869, the testator shewed a rough draft of a will to another son, Francis Savage, who asked what he had done with the original will, and he replied, "To tell you the truth, I have burnt it." There was no other evidence as to the existence of a will.

Pritchard moved for a grant of administration, with the codicil annexed, to Francis Savage, the son and one of the next of kin of the deceased.

Lord PENZANCE. I think the grant ought to be made. The question involved in this case was raised in Black v. Jobling, Law Rep. 1 P. & D. 685, and the court there reviewed the previous decisions upon it. Before the passing of the Wills Act, the principle was that the codicil fell to the ground with the will when the will was revoked, but that if it could be established that the testator intended the codicil to stand by itself, notwithstanding the revocation of the will, then the court would give effect to the codicil. At that time the court entered largely into the question of what testamentary papers constituted the will of the testator, quite independent of the question of their signature by the testator. But then the Wills Act was passed, which expressly enacted (section 20) that "no will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, * * * or by the burning, tearing, or otherwise destroying the same by the testator with the intention of revoking the same." The court cannot, in the teeth of the language of that section, lay down the proposition that a codicil is revoked by the mere fact of the revocation of the will. If this had been the first case in which the question had arisen after the statute, I should have entertained no doubt that the statute governed it, and that the codicil not having been revoked by any of the modes indicated by the statute, it was entitled to probate.

But there have been some decisions on this subject which, as I pointed out in Black v. Jobling, Law Rep. 1 P. & D. 685, are hardly satisfactory. There are two decisions in Notes of Cases, in which the question was raised: In the Goods of Halliwell, 4 N. of C. 400, 401, and Clogstoun v. Wallcott, 5 N. of C. 623, 625. In the first case, Sir H. J. Fust said: "The question is, as the will is not forthcoming, what is to be done with the codicil? Now the presumption would be that the will was destroyed by the deceased, supposing it has not been lost or overlooked; and in that case the codicil would, upon the general principle, fall to the ground with the will." The court there seems to have dealt with the matter quite independently of the words of the statute. In the second case there is this passage in Sir H. J. Fust's judgment: "Under the old law the effect of destroying a will was, by presumption, to defeat the operation of the codicils to the will; by the

present law, there must be an intention to destroy." This passage is certainly hardly satisfactory, because the statute says nothing about an intention to destroy, but that the paper shall not be revoked unless it is actually destroyed. When the matter came before this court in Grimwood v. Cozens, 2 Sw. & Tr. 364, 368, Sir C. Creswell said: "I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was prima facie dependent on the will, and that the destruction of the latter was an implied revocation of the former; and moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute." That is certainly not what Sir H. J. Fust said. He said there was an alteration made by the statute, and the alteration consisted in this, that the statute made it necessary to establish an intention to destroy.

It seems to me that the matter was not properly considered in those cases. I said as much in Black v. Jobling, Law Rep. 1 P. & D. 685, but on looking at the case again, it occurred to me that the meaning of the court had not, perhaps, been made sufficiently clear. The result is that, in my judgment, the words of this statute are imperative, and that the decisions to which I have referred, since the passing of the statute, do not appear to have proceeded on a consideration of the effect of those imperative words. In this case the testator having left behind him a properly executed testamentary paper, which no doubt is in the form of a codicil, that paper must be admitted to probate, unless it is revoked in some manner indicated by the statute. If a testator destroys his will, and does not destroy his codicil, it appears to me that his intention probably is not to revoke the codicil; but I proceed not on the ground of intention but on the words of the statute. I hold that when a testator has once executed a testamentary paper, that paper will remain in force unless revoked in the particular manner named in the statute. Motion granted.[22]

[22] See Gardiner v. Courthope, L. R. 12 P. D. 14 (1886). But see Sugden v. Lord St. Leonards, L. R. 1 P. D. 154, 205-206 (1876); Pepper's Estate, 148 Pa. 5, 23 Atl. 1039 (1892). In the last case the court said: "It is possible that cases may arise where a codicil could be probated separate from the will. But it would be necessary to show that the testator intended it to operate separately from the will."

In Managle v. Parker (N. H.) 71 Atl. 637 (1908), it is held that where a will is executed in duplicate it is not revoked by the mere destruction by testator of the copy in his possession, if he understands that the other copy is left in force. That accords with the rule that only one of exact duplicates need be probated. Crossman v. Crossman, 95 N. Y. 145 (1884).

In re GOODS OF BLECKLEY.

(High Court of Justice, Probate Division, 1883. L. R. 8 P. D. 169.)

Thomas Macdougall Bleckley, M. D., C. B., late a brigade surgeon in Her Majesty's army, deceased, died on the 23d of November, leaving a widow and infant children.

The deceased had made a will dated the 29th of December, 1875, by which after appointing executors and giving certain specific legacies, he bequeathed his property to trustees in trust for his wife for life, and after her death for the children of the marriage. He also made a codicil dated the 13th of May, 1880, by which he appointed a different executor, and in all other respects confirmed his will. The codicil was written at the foot of the will and upon the same sheet of paper.

In October, 1882, he had directed another will to be prepared, but it never was executed, and on the 18th of that month he revoked the will by cutting off his signature thereto, but did not in any way mutilate the codicil. It appeared, however, from the affidavit, that the deceased believed that by destroying the will he had also destroyed the codicil, and on his death bed he told his wife that he would die intestate, and gave her directions accordingly.

Bayford moved for letters of administration as in the case of intestacy.

Sir J. HANNEN, President. The question whether the deceased meant to revoke this codicil depends upon the intention to be gathered from the circumstances of the case, and they satisfy me that he meant to revoke both the will and codicil. Motion granted.[23]

[23] See In re Brookman, 11 Misc. Rep. 675, 33 N. Y. Supp. 575 (1895). "If a will, whether written on one sheet of paper or several sheets, be torn up by the testator, or thrown into the fire, then it is manifest that the act of destruction is directed against the whole instrument, though only a part be destroyed, and that part a codicil only; but if the testator cancels or obliterates a particular clause, or destroys one of the sheets, retaining and preserving the rest, then his purpose to destroy a part only is equally clear, and the sole question is as to the validity and effect of what remains uneradicated; a question which may occur as to the whole residue of the instrument, or (as in Sutton v. Sutton, Cowp. 812; Larkins v. Larkins, 3 Bos. & Pul. 16; Short v. Short, 4 East, 419) as to the residue of a particular clause. In the case before us, it was physically impossible that the act of destruction in question, the burning of the codicil, could have been directed against the will, inasmuch as the will was not present, but in a different custody. And yet the court instructed the jury, that if the testator intended, at the time of destroying the codicil, thereby to revoke the will, in that case the destruction of the codicil was a revocation of both the will and the codicil. If this be correct, it must be either because a codicil is so essential a part of a will that its revocation necessarily involves the revocation of the will (a ground too palpably wrong to require discussion, and not assumed by the appellees' counsel, nor by the circuit court); or because the destruction of a codicil, without any the slightest destruction of the will, or any attempt to destroy it, or even an intent to destroy it, must have the effect of revoking the will, if so intended by the testator. This last proposition, it seems to me, requires but little consideration after what has been already said.

HOWARD et al. v. HUNTER.

(Supreme Court of Georgia, 1902. 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121.)

COBB, J. A paper purporting to be the last will of J. W. Howard was propounded for probate by the nominated executor, and certain persons, describing themselves as the heirs at law of Howard, filed their caveat objecting to the probate of the paper as a will upon the ground that, after the paper was executed, Howard revoked the same, and that, therefore, it is not his last will. The case was carried by appeal to the superior court, and at the trial in that court the judge directed a verdict in favor of the propounder. The case is here upon a bill of exceptions filed by the caveators, complaining that the court erred in refusing to grant them a new trial.

It appears from the evidence that the paper propounded as a will was executed with all the formalities required by law for the execution of wills. When offered in evidence, it was objected to on the

To place it in the strongest light for the appellees, let us suppose that the testator, at the time of burning the codicil, expressly declared that he did it with intent thereby to revoke the will. Could it have that effect? The will itself was in no wise canceled or destroyed, but remained perfect and entire, indestructible and intangible by the act in question. Then is it not obvious, that if revoked, it must have been by the sole efficacy of the testator's parol declaration, directly in the teeth of the statute? The argument of the appellees' counsel is, that the question of revocation is in some degree a question of intention, and the act of cancellation or destruction an equivocal act, which must be done with an intention to revoke, and therefore that, though a partial cancellation or destruction is, prima facie, a partial revocation, yet by the intent of the party, it may be extended to a total revocation. The premises are true, but do not warrant the conclusion. The intent to revoke must concur with the act of revocation, but cannot go beyond it, being limited by law to the act itself. We must not confound the intent to do the physical act of cancellation or destruction, with the intent to produce thereby the legal effect of revocation. When the intent to do the physical act concurs with the act itself, it then becomes an act of revocation; and when the intent to revoke concurs with the act of revocation, it then becomes a legal revocation. When the concurring physical act and intent to do it are partial only, we have merely a partial act of revocation, and, as regards that act, the testator designs to do no more; and thus the question is presented, whether a partial act of revocation can accomplish a total revocation? a question which is answered by merely stating it. In this view of the subject, it avails the learned counsel nothing to prove, from reason or authority, that a codicil is to be taken as a part of the will; for still it is a case of partial revocation. The argument is, however, stronger against total revocation, where the act of cancellation or destruction is applied to the codicil, than where it is applied to a part only of the will; for the part of the will canceled or obliterated may be essential to the validity of the rest, which can never be as regards the codicil relatively to the will. The codicil is a part of the will for construction and testamentary disposition, but not for execution, nor for revocation, when that is applied to the codicil. It is a branch not essential to the existence of the tree, but which can have itself no distinct vitality. In my opinion, therefore, the instruction in question violates both the letter and the spirit of the statute, and is fraught with all the evils of parol revocations." Baldwin, J., in Malone's Adm'r v. Hobbs, 1 Rob. (Va.) 346, 381–383, 39 Am. Dec. 263, 266–268 (1842).

ground that it appeared from the paper itself that as a will it had been revoked by the testator, this objection being based on the following state of facts: The will was written on three of the pages of a double sheet of legal cap paper, and signed on the third page. The attesting clause signed by the witnesses was near the close of the last page, the name of the last witness being on the last fold of the paper when the same was folded up. Across the back of the paper, on the last page, and over this last fold, were these words: "This will is made void by one of more recent date. J. W. Howard." Had this part of the paper been torn off as folded, the name of one of the witnesses to the will would have been torn from the paper.

Did this entry upon the will have the effect to revoke the same? The Code declares that express revocation by written instrument must be executed with the same formality and attested by the same number of witnesses as are requisite for the execution of a will. Civ. Code, § 3342. It is apparent, therefore, that the entry upon the will cannot have the effect of an express written revocation, and this was practically conceded by counsel for the plaintiffs in error. It was contended that, although the entry would fail as a written revocation, it would nevertheless operate as a revocation, for the reason that it amounted to a cancellation of the will. A will may be revoked by destruction or obliteration done by the testator or by his direction with the intention to revoke, and an intention to revoke will be presumed from the cancellation or obliteration of a material portion of the will. Civ. Code, § 3343.

In order for an obliteration or cancellation to be effective as a revocation, it is necessary that the obliteration or cancellation should be upon the will itself, and be of such a character as to indicate clearly that it is the intention of the testator that the paper should be no longer operative as a will. While the mere obliteration or cancellation of an immaterial part of the paper—such as the seal—will not, under the law of this state, raise any presumption of an intention to revoke, if any material part of the will is obliterated or marked, or words indicating an intention to revoke written across the same, a presumption of revocation will arise, and the instrument will be said to have been revoked as a will by cancellation. If, however, the paper be intact, and no material part of the same be obliterated, written across, or canceled in any way, the mere fact that there may appear words on some portion of the paper upon which the will is written which would indicate an intention to revoke will not have the effect of revoking the will when the words are not written in such a way as to have the effect of obliterating or canceling or destroying any words of the will itself. A will may be revoked by a writing, or a will may be revoked by a cancellation. In each case an intention to revoke is necessary to a complete revocation.

But, even though the intention to revoke be present, a revocation will not result unless one of the methods prescribed in the statute is

pursued. Even though there be an intention to revoke by cancellation, and this intention be plainly apparent, a revocation will still not result unless some material portion of the will is obliterated or canceled. And so, if there be an intention to revoke by written instrument, the will will not be revoked unless the writing be signed and attested in the manner provided for the execution of a will itself. In the present case it is manifest that the testator had the intention to revoke. This intention was to revoke by written instrument, and the revocation fails for the reason that the writing was not signed in the presence of three witnesses in the manner provided in the statute. The writing cannot operate as a revocation by cancellation for the reason that no material portion of the will is canceled or obliterated.

We think this conclusion is demanded by the provisions of our Code. The provisions of the Code on the subject of revocation of wills are substantially the same as those of the English statute of frauds. In the case of Ladd's Will, 60 Wis. 187, 18 N. W. 734, 50 Am. Rep. 355, it was held under a statute which contained provisions very similar to those in our Code on the subject of revocation of wills by written instrument and cancellation, that, where a will was written on the first page of a double sheet of paper, and the testatrix wrote upon the fourth page of the sheet the words, "I revoke this will," signing and dating the same, but such writing was not attested, or subscribed by witnesses, the words did not take effect as a written revocation, nor did the same amount to a cancellation of the will. The conclusion just stated was reached in that case after an exhaustive examination of authorities, which are collected together in the opinion of Mr. Justice Cassoday.

In Lewis v. Lewis, 2 Watts & S. (Pa.) 455, it was held that the word "Obsolete," written by a testator on the margin of his will, but not signed in the manner provided in the statute of Pennsylvania, did not operate as an express revocation of the will, nor amount to a cancellation of the same. In the case of Warner v. Warner's Estate, 37 Vt. 356, it was held that, where a testator wrote his will mostly upon one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterwards wrote below all the writing, and near the middle of the sheet, "This will is hereby canceled and annulled in full this 15th day of March, 1859," this amounted to a revocation of the will by canceling. The ruling made in that case was said by Mr. Justice Cassoday, in the opinion in the case above referred to, to be "in opposition to the principles maintained by some of the best adjudicated cases," and attention was called to the fact that that decision was condemned by one of the ablest text writers on the subject of wills. See 1 Redf. Wills (4th Ed.) *318.

In the case of Semmes v. Semmes, 7 Har. & J. 388, which is sometimes cited as authority for the proposition that written entry upon a will may have the effect to revoke the same as by cancellation, it ap-

peared that there was not only a written entry upon the will indicating an intention to revoke, but a pen had been drawn across the signature of the testator and the names of the subscribing witnesses, which, of course, would have the effect of canceling the will, independently of the entry upon the paper. As to the effect of drawing lines with a pen across words in a will, see In re Kirkpatrick's Will, 22 N. J. Eq. 463; Glass v. Scott, 14 Colo. App. 377, 60 Pac. 186.

In the case of Evans' Appeal, 58 Pa. 238, where it was held that a will was canceled, in addition to the word "Canceled" having been written upon the back of the will, the signature of the testator to a codicil was crossed out, and the word "Canceled" written under it; the signature of the testator appeared in two places in the original will, and one of these was crossed out by a line drawn through it and the date written under it; and the will itself was torn in two places. In Witter v. Mott, 2 Conn. 67, it was held that words expressive of an intention to revoke, written by a testator on the back of his will, and signed, but not attested, by three witnesses, operated as an express revocation of the will. There was, however, no statute in Connecticut requiring written revocations of wills to be signed in the presence of three witnesses. This case, of course, furnishes no authority, in view of our statute, for holding the entry on the will in the present case to be an express revocation in writing.

We have called attention to the cases from Vermont, Maryland, and Pennsylvania for the reason that the two former were relied on by counsel for the plaintiff in error in the present case, and the latter is sometimes cited as authority for the proposition that there may be a cancellation of a will by an entry to that effect upon the paper, although such entry did not have the effect of obliterating or canceling any material part of the will. The two latter cases are clearly distinguishable from the present case for the reasons above stated. The Vermont case supports the contentions of counsel, but that case is not, in our opinion, sound, and, as has been shown above, it has met with adverse criticism at the hands of a learned text-writer, as well as at the hands of a jurist of undoubted learning and ability. See, also, upon the subject of revocation of wills by cancellation, Page, Wills, §§ 244–249; Schouler, Wills (3d Ed.) § 419 et seq.; 1 Redf. Wills (4th Ed.) *318 et seq.; 1 Underh. Wills, § 228 et seq.; Pritch. Wills, § 262; Beach, Wills, § 55; 1 Jarm. Wills (6th Am. Ed. Big.) *113 et seq.

Error is assigned upon the refusal of the judge to allow a witness to testify that a few days before the death of the testator he had arranged with him and two other witnesses to meet the testator at an appointed time and place for the purpose of witnessing the execution of a will, and in refusing to admit in evidence a paper purporting to be a will of J. W. Howard, which was unsigned. There was no error in either of the rulings complained of. The only purpose in introducing this evidence was to show an intention on the part of

Howard to revoke the will which was propounded for probate. There was no question as to the fact that Howard had this intention. It was manifest from the entry upon the paper, and the controlling question in the present investigation was whether this intention had been carried into effect. The judge did not err in any of the rulings complained of, nor in directing a verdict in favor of the propounder.

Judgment affirmed.[24]

OETJEN et al. v. OETJEN.

(Supreme Court of Georgia, 1902. 115 Ga. 1004, 42 S. E. 387.)

COBB, J. In the case of Howard v. Hunter, 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121, this court held that, in order for a written entry upon a will to operate as a revocation thereof, it must have either been attested in the same manner and with the same formality as is required for the execution of a will, or the entry must have been written upon the will in such a manner as to obliterate or cancel some material portion of the will. The facts of the present case are almost identical with those of the case just referred to, the only difference being that one word of the entry in the present case was written across one word in the last line of the will. This word was in a sentence which stated merely that a word in the will had been changed before signing. It thus appears that no material portion of the will was obliterated, even if the mere writing across a word in a will, leaving the same perfectly legible, could be said to be an obliteration or cancellation, within the meaning of the statute which provides that a will may be revoked by canceling some material portion thereof. The case is, upon its facts, absolutely controlled by the decision in Howard v. Hunter.

Judgment affirmed.

In re GOODS OF WOODWARD.

(Court of Probate, 1871. L. R. 2 P. & D. 206.)

Lord PENZANCE.[25] I think in this case probate ought to go. On the death of the testator a will was found in his custody, and duly executed; and the question is, whether it was ever revoked. The only evidence of the matter is contained in the fact that when found

[24] "It seems to be generally held that cancellation, obliteration, or erasure made after the execution of a will, which does not in fact destroy some portion of the material substance of the will, does not constitute a revocation thereof. The words written on the blank margin of this will do not touch any part of the will proper." Brown, J. (dictum), in In re Shelton's Will, 143 N. C. 218, 55 S. E. 705 (1906). See, also, Lewis v. Lewis, 2 Watts & S. (Pa.) 455 (1841); Matter of Akers, 74 App. Div. 461, 77 N. Y. Supp. 643 (1902).

[25] The statement of facts is omitted.

seven or eight lines at the beginning of the document had been partially cut and partially torn off. The point for my decision is, whether in that state of things, without any other circumstances tending to shew that the testator intended to revoke his will, a revocation has been effected. By 20th section (1 Vict. c. 26) no will or codicil, or any part thereof, shall be revoked otherwise than by marriage, or by another will, codicil, or writing duly executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same. Here the will was duly executed, and there is no evidence of an intention to revoke it, unless such an intention can be gathered from the fact that the first lines of the will were destroyed.

The case of Clarke v. Scripps, 2 Rob. Ecc. 563, seems to be most in point. That was a very careful judgment of Sir J. Dodson, in which he investigated all the previous decisions, and I quite coincide in the reasons he gives for his judgment. He says: "Out of the mutilated state of this instrument arises the question, not very easy of solution, namely, whether the will is to be considered revoked in toto, or in part only. Upon this enactment (1 Vict. c. 26, § 20) it is obvious, first, that a part only of a will may be revoked in the manner described; in other words, that the whole will is not necessarily revoked by the destruction of a part; nevertheless, I do not by any means intend to say that the destruction of a part may not under certain circumstances operate as a revocation of the entire will. Secondly, it is to be observed that the burning, tearing, or otherwise destroying the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means, which will satisfy the requisites of the law; the act must be accompanied with the intention to revoke; there must be the animus as well as the act, both must concur in order to constitute a legal revocation. It is the animus also which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some and what portion thereof. Now the intention of a testator to revoke wholly or in part may, I conceive, be proved, first, by evidence of the expressed declaration of a testator, especially if such declaration was contemporaneous with the act. * * * Secondly, the intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator, i. e., it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself it may be inferred, either he did intend to destroy it altogether or did not."

I think that is a very good way of regarding the question, for it is obvious that the mutilation may be of such a part and in such a manner as to afford evidence that the deceased did not intend the document any longer to operate as his will. If, for instance, he should

tear off the seal or his own signature? Applying the reasoning to the present case, I have come to the conclusion that, in the absence of any evidence to the contrary, the mere cutting off eight lines at the beginning of the document does not shew an intention to revoke the whole will. It may be said that the object of tearing off the first part was to destroy the statement that it was the last will and testament of the deceased, which is a material averment, but the force of that observation depends very much, if not entirely, upon the consideration whether there was anything else of moment or importance in that part of the will destroyed, which the testator might have wished to revoke. It is probable in this case that there was. It seems probable that the part torn off did contain something besides the mere statement that the document was the last will and testament of the deceased, and it might very well have been that the deceased tore it off in order to get rid of that. I consider, under these circumstances, that the will is not revoked, and must be admitted to probate.[26]

BIGELOW v. GILLOTT.

(Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 102, 25 Am. Rep. 32.)

Appeal from a decree of the probate court for the county of Suffolk, allowing a certain instrument, with the exception of the "sixth" and "thirteenth" clauses thereof, as the last will and testament of Thomas Liversidge, deceased. The will of the testator contained the following clauses:

"Sixth. I give to my executors the sum of six thousand pounds sterling, in trust, to be used and appropriated by them for the purpose of paying the debts which my father, Stephen Liversidge, owed in the year eighteen hundred and twenty-nine, said payment to be made to the legal representatives of the persons who were his creditors at the time: and it is my will and I hereby direct, that the principal only of said debts shall be paid, excluding interest; the sum of six thousand pounds being, in my opinion, sufficient for this purpose. If any portion of said six thousand pounds shall remain after payment of said debts, such remainder is to belong to the residue of my estate, and to be disposed of accordingly by said trustees."

"Thirteenth. I give and bequeath to John Shufeldt, of Marshfield,

[26] See Sellards v. Kirby (Kan.) 108 Pac. 73 (1910). But see Leonard v. Leonard, [1902] P. 243. In Ohio, where partial revocation is not permitted, it has been held that the tearing of part of a will with the intent to revoke that part only, and not the whole will, does not revoke the will. Coghlin v. Coghlin, 79 Ohio St. 71, 85 N. E. 1058 (1908). Compare Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254 (1882), which held that under the New York statute no obliteration could be effective unless it altogether destroyed the whole will. See, also, In re Kissam's Will, ante, p. 254. But see In re Curtis' Will, 135 App. Div. 745, 119 N. Y. Supp. 1004 (1909).

in the county of Plymouth, the use and improvement of the estate and farm belonging to me in said Marshfield, during the term of his natural life, on the condition that said Shufeldt shall pay all taxes and cost of insurance appertaining to said estate, and shall continue to live thereon and occupy and cultivate the estate."

[The nineteenth clause gave his homestead estate to trustees to maintain a charitable institution.]

"Twentieth. I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed, to said Eleazer J. Bispham, Frederic A. Wellington and George Tyler Bigelow, absolutely and forever, in trust, nevertheless, to be appropriated, used and applied for the maintenance and support of the institution named and described in the last preceding clause of this will."

The appellants, the heirs at law of the testator, filed certain reasons of appeal, the following being the only one relied on in this court:

"That, it having clearly appeared by the evidence before the probate court that the obliterations in said paper writing were made subsequently to the execution thereof, as the last will and testament of the alleged testator, and that no re-execution took place after said obliterations were made, the probate court, as it decreed the probate of the will, excepting the sixth and thirteenth clauses, should also have decreed that the portion of the estate originally disposed of under said sixth and thirteenth clauses, remained undisposed of by the testator at the time of his death, and passed to his heirs at law."

Hearing before Colt, J., who found that the will was duly executed on or about the time of its date, in the manner required by law, by Thomas Liversidge, as and for his last will and testament, and that he was at the time of executing the same of full age and of sound mind; that in the will, as presented for probate, ink lines appeared, drawn probably with a pen, through and across each and every word constituting the clauses of the will, numbered respectively "sixth" and "thirteenth," leaving the words, however, legible; that the lines were drawn across the words by Liversidge in his lifetime, after the execution of the will by him as aforesaid; and, on all the evidence bearing upon the intention of the testator in making these erasures, and upon the inspection of the original will, found, if competent so to find, that the erasures were made by the testator with the intention of revoking the sixth and thirteenth clauses of his will, but with no intention of revoking or defeating the other provisions of his will.

The question whether the evidence before him (which was annexed to the report), together with the original will, justified this finding, as well as the question, what effect those acts of the testator might have upon the will and the probate of it, were reserved for the consideration of the full court.

MORTON, J. The presiding justice who heard this case has found as facts, that the testator erased the sixth and thirteenth clauses of his

will after its execution, and that such erasures were made with the intention of revoking the said clauses, but with no intention of revoking or defeating the other provisions of the will. These findings were clearly justified by the evidence. We need not consider the evidence in detail, as the appellants do not contend that the findings were erroneous, the only questions raised by them being as to the legal effect of such erasures.

The statute provides that "no will shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other will, codicil or writing, signed, attested and subscribed, in the manner provided for making a will." Gen. St. c. 92, § 11. This provision is a re-enactment of Rev. St. c. 62, § 9, with merely unimportant verbal changes. The Revised Statutes made material changes in the law as to wills, doing away with the distinctions between wills affecting real, and wills affecting personal, property, and putting all upon the same footing. St. 1783, c. 24, § 2, permitted the revocation of a devise of land, "or any clause thereof," in the manner pointed out in the statute, which was the same manner now provided for the revocation of a will.

We see nothing to indicate that the Legislature, in the revision of 1836, intended to change the law in this respect and to limit the power of revocation to a revocation of the whole will. The power to revoke a will includes the power to revoke any part of it. If we were to hold that under this provision a testator could not revoke a part of a will by cancelling or obliterating it, we should be obliged by the same rule of construction to hold that he could not revoke a part by a codicil, which would be against the uniform practice in this commonwealth, sanctioned by numerous decisions.

We are therefore of opinion that, in this case, the cancellation by the testator of the sixth and thirteenth clauses of his will, by drawing lines through them, with the intention of revoking them, was a legal revocation of those clauses.

The remaining question is as to the effect of this revocation upon the property affected by the revoked clauses. The appellants contend that the property devised and bequeathed therein is to be treated as intestate property, which goes to the heirs at law or distributees; and the executors and trustees contend that it passes to them under the residuary clause of the will.

It is a clearly settled rule of law that, in a will of personal property, a general residuary bequest carries to the residuary legatee all the personal property of the testator which is not otherwise disposed of by the will, including all lapsed legacies and all void legacies. And in this commonwealth, since the passage of the Revised Statutes in 1836, the same rule applies to wills of real estate. Thayer v. Wellington, 9 Allen, 283, 85 Am. Rep. 753, and cases cited. It is true that if a special bequest in a will lapses or fails for any reason, the sum bequeathed

will not pass to the residuary legatee if it appears from the will that it was the intention of the testator to exclude it from the residuary clause. In Thayer v. Wellington, ubi supra, the court say: "We take the rule to be that a general residuary clause passes all the estate of the testator not otherwise disposed of, unless it is manifestly contradictory to the declared purpose of the testator, as found in other parts of the will. There must be a clear intention that in no event it shall pass to the residuary devisee."

In this case, there is nothing to indicate an intention on the part of the testator that the property covered by the revoked clauses should not go to the residuary devisees. The residuary clause is expressed in the broadest terms. "I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed." The intention of the testator is clear, to give all his property, not otherwise disposed of by the will, to the trustees named therein, for the support of the charity established by the nineteenth clause. He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will. The only fair inference is that he intended that the property covered by those clauses, and which by his revocation became undisposed of by the other clauses of the will, should fall within the residuary clause. We are of opinion that this case falls within the general rule, and that the property in question passes to the residuary devisees.

The argument of the appellants, that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses, is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property. It is disposed of by the residuary clause, which is executed with all the formalities required in the execution of a testamentary disposition of property. Decree of probate court affirmed.[27]

[27] In Swinton v. Bailey, 4 App. Cas. 70 (1878), Lord Penzance expressed the opinion that part of a will may be revoked, even if the effect is to increase the gifts to others who take under the will. The same opinion is expressed in Collard v. Collard (N. J. Prerog.) 67 Atl. 190 (1907). See, also, Larkins v. Larkins, 3 B. & P. 16 (1802); In re Coyte, 50 L. T. (N. S.) 510 (1887); In re Frothingham's Will (N. J.) 74 Atl. 471 (1909). But see, contra, Eschbach v. Collins, 61 Md. 478, 48 Am. Rep. 123 (1884), and Miles' Appeal, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176 (1896). See, also, Gardner v. Gardiner, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383 (1889); Pringle v. McPherson, 2 Brev. (S. C.) 279, 3 Am. Dec. 713 (1809).

In Swinton v. Bailey, supra, the testator reduced a gift to "Elizabeth Ely, her heirs, and assigns forever," from a fee to a life estate by striking out the words "Ely, her heirs, and assigns," and the reduction was upheld. In Eschbach v. Collins, supra, where the will as originally executed gave life estates to all the sons except two, the testator, by erasing the names of the two, made the will read, in the opinion of a majority of the court, that all the sons should take absolutely, and in consequence the court gave effect to the will as originally written and executed. In Home of the Aged v. Bantz, 107 Md. 543, 69 Atl. 376 (1908), it is held that cancellation of portions of a will does not revoke the whole will, where the remaining parts can stand alone,

SECTION 4.—SO-CALLED REVOCATION BY CIRCUMSTANCES

DOE d. WHITE v. BARFORD.

(Court of King's Bench, 1815. 4 M. & S. 10.)

At the trial of this ejectment, before Heath, J., at the last Cambridgeshire Assizes, the case was this:

The plaintiff claimed under the will of one J. Bonteel, who, being seised in fee in 1791, married, and in 1792 made his will, and devised

and is pointed out that Eschbach v. Collins, supra, recognized that a testator may revoke by cancellation one or more clauses in his will without invalidating the rest, "if such revocation does not operate to enlarge the estate of any one who takes under the will, or to change the character of the remaining provisions of the instrument." 107 Md. 555, 69 Atl. 379. In Miles' Appeal, supra, the refusal of the lower court to give effect to the cancellation of a specific legacy to the increase of the residue was first supported on the ground that the evidence failed to show that the cancellation was by the testatrix or in her presence as required by the statute (substantially the Statute of Frauds provision), and then the court went on to say: "It would perhaps be too strict a construction of the statute referred to, if we held that under no circumstances could there exist a partial revocation of a will or codicil, effected by burning, canceling, tearing or obliteration; that such revocation must extend to the whole instrument and be operative to revoke the whole, or be without effect. Such a construction has indeed been given to very similar statutory provisions in several other jurisdictions. But probably the weight of authority upon the question is otherwise. The entire subject is most exhaustively and ably treated in a note to the case of Graham v. Burch, 28 Am. St. Rep. 344. That, on the other hand, if we were to declare, following the language of the opinion often cited in Bigelow v. Gillott, 123 Mass. 102 [25 Am. Rep. 32], that the authority to revoke an entire will included the lesser power to revoke any portion of it only, and to stop there, as the court in Massachusetts does, it seems to us that an inference might be drawn that would extend entirely too far. For, if such conclusion, looking at the statute in question alone, might be drawn, there is another statute appearing upon the same page of the General Statutes, namely section 538, providing how wills must be executed. If a case arises which is simply and purely one of revocation, section 538 will not apply. But if such revocation involves alteration, it certainly must apply. The difference in meaning between the two terms is aptly stated by Mellish, L. J., in Swinton v. Bailey, 45 L. J. Ex. 427, where a testator by his will had devised his real estate to E., 'her heirs and assigns forever.' He subsequently obliterated these words with pen and ink. The judge said (page 429): 'The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before, then it is revocation, but if it gives something in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration.' In Eschbach v. Collins, 61 Md. 478 [48 Am. Rep. 123], is an able discussion of this matter. In that case the effect of erasures was to enlarge the estates of the devisees from life estates to fees. The court held such erasures inoperative under a statute which provided that a will, or any clause thereof, might be revoked by cancellation. The court said (page 499): 'The will has not been revoked; it has been altered. It cannot be supposed that when the Legislature uses the word "revocation," it is to be construed to mean "mutation." * * * When by the obliteration of certain words a different meaning is imparted there is not

the premises in question to his niece, from whom the plaintiff derived title. J. B. died leaving his wife enseint, which was unknown to either of them at the time of his death, and afterwards the wife was delivered of a daughter, from whom, as heir at law, the defendants derived title. And the question was, Whether this alteration of circumstances was an implied revocation of the will. The learned judge ruled that it was not, and there was a verdict for the plaintiff.

And now Blosset, Serjt., moved for a nonsuit.

Lord ELLENBOROUGH, C. J. The argument seems to be, that because the testator, had he known his situation, ought to have revoked his will, therefore the law will impliedly revoke it. But if it is to be understood that every will is made upon a tacit condition that it shall stand revoked whenever the testator by the circumstance of the birth

a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition which must be authenticated by the observance of the statutory requirements.' The court gives as an illustration of how fully such a transmutation might be made by mere erasures, this example: Suppose the original words were, 'To my son William I give nothing, and give all my estate to my son John.' The will with no addition could be made to read, 'To my son William I give all my estate.' This may seem an extreme illustration, but probably there are few wills made, of any considerable length, in which alterations in meaning, by mere erasure, could not be effected, as objectionable, if not as marked as this. Indeed, without holding that there are none, it seems to us that there are few cases that could arise where the revocation of a portion only of a will, would not operate to alter other portions of it. If an entire clause—meaning by that word one of those distinct and generally numbered subdivisions into which wills are frequently aparted, or an entire unconnected provision making disposition of property—be erased or canceled, and what was thus disposed of becomes intestate, it may be said that there is a revocation, and nothing more. The same thing has been affirmed by some courts where, instead of such intestacy, the property passes into a prescribed residuum. But this appears to us to be more questionable. The residuary devisee or legatee takes by virtue of the will, defeating the heir, and he takes by force of the alteration what he did not take without it. The mischief seems the same. The distinction is more apparent than the difference. Take the very case before us: There were originally two clauses. One disposed of certain stock; the other of the balance of the estate. By revoking the first, there ceased to be any residue, unless the estate in its entirety can be so styled. But look at the object of the change. Was it revocation, or was it alteration? One of the brothers of the testatrix procured a copy of the will from another brother who had it in his possession. He was apparently curious until he knew its contents, and dissatisfied when he learned them. He said to his sister, 'By your will you have given my brother Charles' family twenty-four shares of the New York and New Haven Railroad stock, and you have given my brother David and myself eight.' She said 'I won't have it so; I will scratch it out.' What was this interested brother's motive? To defeat his nieces of their legacies? Or was it rather to increase his own? What would the old lady 'not have so'? That her nieces should be remembered, or that the families of those brothers should be treated unequally? It seems to us the answer is obvious, and that to all just intents and purposes here was not merely revocation, but substitution; not destruction, but reconstruction; a 'scratching out' indeed, but one equivalent to a writing in; the making of a new testamentary disposition, and in a manner not permitted by law—a law passed in the interest of public policy, the wisdom of which such a case as the present abundantly demonstrates."

of a child becomes morally bound to provide for it, I do not see why the birth of any one of a numerous succession of children would not equally work a revocation. But where are we to stop? Is the rule to vary with every change which constitutes a new situation giving rise to new moral duties on the part of the parent? Marriage, indeed, and the having of children, where both those circumstances have concurred, has been deemed a presumptive revocation, but it has not been shown that either of them singly is sufficient. I remember a case some years ago of a sailor who made his will in favor of a woman with whom he cohabited, and afterwards went to the West Indies and married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation. In Doe v. Lancashire, 5 T. R. 49, it was adjudged that marriage and the pregnancy of the wife with the knowledge of the husband, and the subsequent birth of a posthumous child, came within the rule, the same as if the child had been born during the parent's life. In this case it is desired of us to extend the rule a step farther, but I own I am afraid of so doing.

LE BLANC, J. Lord Kenyon considered the rule as founded upon a tacit condition annexed to the will, that if the party should marry and have a child it should not take effect.

PER CURIAM. Rule refused.[28]

[28] On "revocation" of wills by marriage and birth of issue, see 9 Prob. Rep. Ann. 423, note; 7 Am. & Eng. Ann. Cas. 786, note. But it should be remembered that statutes have been passed giving to children born after a will and not provided for therein certain inheritance rights, even though in most jurisdictions their birth does not revoke the will. In Iowa the birth of a child alone will revoke the will. McCullum v. McKenzie, 26 Iowa, 510 (1868); Negus v. Negus, 46 Iowa, 487, 26 Am. Rep. 157 (1877). The Iowa rule was adopted before there was a statute on the subject. It is now a statutory matter there. Fry v. Fry, 125 Iowa, 424, 101 N. W. 144 (1904).

In Re Del Genovese's Will, 56 Misc. Rep. 418, 107 N. Y. Supp. 1033 (1907), affirmed 120 N. Y. Supp. 1121 (1909), it was held that the will of a man was revoked by his marriage and the subsequent birth of issue, although the wife's first husband had the right to have the marriage annulled.

A will has been held revoked by a subsequent marriage and birth of a child, although the testator was married to his first wife at the time of making the will. Christopher v. Christopher, Dick. 445 (1771). But see Yerby v. Yerby, 3 Call (Va.) 334 (1802). In Gibbons v. Caunt, 4 Ves. 840, 848 (1799) the Master of the Rolls suggested that a revocation might be held where there was "the birth of children by the first wife after the execution of the will, and after the death of the wife, a subsequent marriage, and no children by that."

TYLER v. TYLER.

(Supreme Court of Illinois, 1857. 19 Ill. 151.)

SKINNER, J.[29] The case shows, that Stephen H. Tyler, and the complainant intermarried in this state, in 1842, and here lived as husband and wife until his death in 1855; that he died, never having had a child, and leaving a considerable estate, real and personal, in this state, and that the defendants claim his estate under a will executed in the state of Connecticut, where Tyler then lived, in 1834, which will devises his entire estate to his blood relatives.

The material question is whether this will, by the change of condition of the deceased, is revoked.

It is essential to a valid will that it be the mind and intention of the maker, in relation to the matters to which it relates, at the time of his death. And an instrument executed in legal form, purporting to be a last will and testament, whenever made, is received as the last will and purpose of the maker, until shown to have been revoked in some of the ways known to the law.

Our statute contains substantially the same provisions in relation to revocation of wills, as the English statute of 29 Charles II; and the courts of that country have uniformly held, that marriage and the birth of a child, effecting a radical change in the condition, relation and duties of one who before had made a will providing for no such contingency or change of condition, by operation of law and presumptively revoke such will; but that marriage alone will not raise such presumptive revocation. [Citations omitted.]

By the law of descents, both in England and in this country, the child may inherit the parent's estate; but there the wife is not heir to the husband, while here she, in case there be no child or descendant of a child of the husband, is such heir and may inherit the one-half of his lands.

The reason of the law is the essence and soul of the law; and the reason of the common-law rule existing here by force of our statute, making the wife heir to the husband and the husband heir to the wife, where there is no child or lineal descendant [having gone], the rule should go with it.

Where a statute of the mother country or of a sister state is adopted into our law, the rule is that with it is adopted the construction of such statute which, prior to its adoption, uniformly obtained.

The wife, ordinarily, where there are no children to provide for, is a far more meritorious object of the husband's bounty than collateral kinsmen, and is presumed to engage more intensely his emotions of interest and affection. It cannot, therefore, be supposed that he would willingly die leaving her disinherited and unprovided for.

[29] The statement of facts and the concurring opinion of Breese, J., are omitted.

We hold that marriage, under our statute making the wife heir to the husband and the husband heir to the wife, where there is no child or descendant of a child, is, in the absence of facts showing an intention to die testate arising subsequent to the marriage, a revocation of a will of the husband, made prior to the marriage, disposing of his entire estate without making provision in contemplation of the relations arising out of it.

Decree reversed and cause remanded.[30]

SWAN v. HAMMOND.

(Supreme Judicial Court of Massachusetts, 1884. 138 Mass. 45, 52 Am. Rep. 255.)

COLBURN, J. It appears by the record and agreed facts in this case that Susan E. Haven, an unmarried woman, made her will May 20, 1853; that she was then possessed of real and personal estate, all of which by her will she devised and bequeathed to her sister, who was named as executrix: that on October 3, 1861, she married Thomas F. Hammond, and lived with him until her death, on January 18, 1883. Her husband had no knowledge of the existence of the will until after

[30] See Colcord v. Conroy, 40 Fla. 97, 23 South. 561 (1898); In re Teopfer's Estate, 12 N. M. 372, 78 Pac. 53, 67 L. R. A. 315 (1904); Brown v. Scherrer, 5 Colo. App. 255, 38 Pac. 427 (1894); Scherrer v. Brown, 21 Colo. 481, 42 Pac. 668 (1895). Compare In re Petridge's Will, 47 Wash. 77, 91 Pac. 634 (1907). But see Hoy v. Hoy, 93 Miss. 732, 48 South. 903 (1908); Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419 (1896). In Hoy v. Hoy the state statute made the widow an heir, and the court said: "We think there can be no doubt that the decided weight of authority inclines to the view that a man's will is not revoked by a subsequent marriage without birth of issue. It would protract this opinion to undue length to review in detail the authorities from Florida, Idaho, Illinois, New Mexico, and Colorado holding to the contrary view. They are criticised in the case of Hulett v. Carey, supra. But one general observation may be made. All of the cases, except Brown v. Scherrer, supra, are decided in states where an unrevoked will would leave the widow without any redress. If it be correct, as most of the American authorities hold, that the common-law rule is based upon the consideration that, if the will is permitted to stand, the heir would not receive any part of the estate, no reason can exist why the rule should be altered in this state, since the widow is well cared for by the right to renounce the will. It is not an accurate statement of the effect of our statute that the wife is placed in the precise attitude of other heirs. She is more than that. She has the right to defeat absolutely any effort of the husband to prevent her participation in the estate. In this aspect, the right of renunciation is akin to that of dower." 93 Miss. 763, 764, 48 South. 907, 908 (1908).

On the revocation of wills by marriage alone, see 10 Prob. Rep. Ann. 230, note. In the Matter of the Will of Esther R. Tuller, 79 Ill. 99, 22 Am. Rep. 164 (1875), the rule in Tyler v. Tyler, supra, was so qualified as not to apply to a case where at the time of the marriage the testator had children who under the state statute would inherit to the exclusion of the other party to the marriage. The matter was finally covered by statute making marriage alone a revocation. Under that act marriage revokes the whole will. McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552 (1887) Compare In re Larsen, 18 S. D. 335, 100 N. W. 738 (1904).

her decease. No child was born of the marriage. The will was presented for probate in Middlesex by the executrix therein named, and was approved and allowed on April, 1883, and the husband appealed. The only question presented is whether the will was revoked by the marriage.

It has been well settled by common law, at least since Forse & Hembling's Case, 4 Coke, 60b, decided in 1589, that the marriage of a feme sole revokes her will. In case of a man it is equally well settled that marriage alone does not revoke his will, but that marriage and the birth of a child do. 1 Jarm. Wills, 122; Warner v. Beach, 4 Gray, 162.

The reason why the will of a feme sole is revoked by her marriage is commonly stated to be that marriage takes away her testamentary capacity, and destroys the ambulatory nature of her will; and it is urged in argument that since the statutes allowing a married woman to make a will, with certain limitations as to the rights of the husband, were passed, the reason upon which the rule was founded, that the will of a feme sole is revoked by marriage, no longer exists; and that her will, like that of a man, should be held to be revoked, not by marriage alone, but by marriage and the birth of a child. This argument is not without force, but its force would be much greater if we could see any good reason why, in the case of a man, both marriage and the birth of a child should be held necessary for the revocation of his will. The rule was adopted from the civil law, and is now firmly established as part of the common law; but the reason upon which it is founded is not obvious.

Marriage alone, in the case of a man or woman, would seem to be a sufficient change in condition and circumstances to cause an implied revocation of a will previously made. A will made before marriage, and taking effect after marriage, must take effect in a very different manner from that in the mind of the testator when the will was made. The rights of the husband or wife must greatly modify its provisions; and it can hardly be supposed that an unmarried person would make the same will he or she would make after marriage. If we were under no restraint, we might well hesitate to hold that, since testamentary capacity has been given to women, a will made by a woman when sole should be revoked only by marriage and the birth of a child, as in case of a man, for the sake of uniformity only, when we are inclined to think a better rule would be that in case of a man his will should be revoked by marriage alone. But such a rule can only be introduced by the Legislature. In England, by St. 7 Wm. IV. and 1 Vict. c. 26, § 18, and in many of the states in this country, it has been provided by statute that the wills of both men and women shall be revoked by marriage. See collection of statutes in 1 Jarm. Wills (5th Am. Ed., by Bigelow,) 122, note.

But we are of the opinion that the question now before us has been so far settled by statute as not to admit of change by construction.

Section 8, c. 127, Pub. St., after providing that no will shall be revoked, unless by burning, tearing, etc., or some other writing executed in the manner required in the case of a will, goes on as follows: "But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." It is not apparent that an entire revocation, by implication of law, results from any change of condition or circumstances except that of a subsequent marriage. See the discussion in Warner v. Beach, ubi supra.

This clause as to implied revocations was first introduced into Rev. St. c. 62, § 9. The other provisions as to revocation were substantially taken from St. 1783, c. 24, § 2. The commissioners in their note to this section say: "The clause as to implied revocations recognizes and adopts the existing law, as established and understood among us." And their further discussion of this subject shows clearly that they had in mind the rule of the common law, that, in case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone, revoked a will previously made.

We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule, in case of a woman, no longer exists. This was the view taken in Brown v. Clark, 77 N. Y. 369, upon a similar question, under a statute of New York.

We are therefore of opinion that the will of Susan E. Hammond was not properly admitted to probate. Decree of probate court reversed.[31]

DURFEE v. RISCH.

(Supreme Court of Michigan, 1905. 142 Mich. 504, 105 N. W. 1114, 5 L. R. A. [N. S.] 1084.)

MONTGOMERY, J. On appeal from the probate court, the circuit judge directed a verdict admitting the will in question to probate. Contestant appeals.

Testatrix, while unmarried, executed the will in question. She subsequently married, and had issue, one child, who survives. The sole question is whether the will of a single woman is revoked by her subsequent marriage, followed by the birth of a child or children. Our

[31] See Nutt v. Norton, 142 Mass. 242, 7 N. E. 720 (1886); In re Petridge's Will, 47 Wash. 77, 91 Pac. 634 (1907). But see Emery, Appellant, 81 Me. 275, 17 Atl. 68 (1889), holding that, the reason for the old rule having ceased, the marriage of a feme sole no longer revoked her will.

That the will of a single woman is revoked by her marriage, at least to the extent her husband would be excluded from curtesy, is asserted in Vandeveer v. Higgins, 59 Neb. 333, 80 N. W. 1043 (1899).

statute of wills (section 9270, Comp. Laws), which prescribes the formalities required for the revocation of wills, provides that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

There is no doubt that at the common law the marriage of a male testator, followed by birth of issue, operated to revoke a will. This revocation was implied from the changed relations and obligations of the testator, and was based upon the presumption that had the same conditions and obligations existed at the time of the execution of the will and been taken into account, a different will (if any) would have been made. Page on Wills, § 282; Woerner's Am. Law of Administration (2d Ed.) § 54. It is difficult to suggest any reason why the same implication of a revocation should not arise in case of a female testatrix. The presumption that, had the same conditions existed at the time of the execution of the will as existed later, the disposition of the estate would have been different, is certainly as strong in the case of a wife and mother as in case of a husband and father.

The proponent argues that the rule as to the revocation of the will of a female was, at the common law, that her subsequent marriage alone revoked the will; that since by statute a married woman may now make a valid will, and since it is generally held that the effect of this statute is to abrogate the rule that marriage alone (in the case of a woman) revokes the rule, it follows that there is left no common-law rule upon which a revocation of a will by a female can be predicated. This is ingenious, but not convincing. It is true that the weight of authority sustains the view that, where statutes like our Married Woman's Act (section 8690) exist, marriage of a feme sole does not of itself operate to revoke the will. Kelly v. Stevenson, 85 Minn. 247, 88 N. W. 739, 56 L. R. A. 754, 89 Am. St. Rep. 545; In re Will of Ward, 70 Wis. 251, 35 N. W. 731, 5 Am. St. Rep. 174. This is the rule in this state. Noyes v. Southworth, 55 Mich. 173, 20 N. W. 891, 54 Am. Rep. 359.

The common-law rule as to the implied revocation resulting from marriage of the testatrix rested upon the ground that, after marriage, she could not make a new will, and as a will is ambulatory during the life of the testator, the continuing purpose to continue the will previously made in force could not be presumed from mere inaction on the part of one who, because of disability, could not act. Where, as in this state, the reason for this rule fails, the rule fails. It does not follow, however, because the marriage alone does not revoke the will, that marriage and birth of issue do not. The abrogation of this rule places the male and the female on the same plane as to this; i. e., that the subsequent marriage does not of itself revoke the will. But it is illogical to say, because the existence of a more restricted rule to the wills of females prevented the application of the general rule of the common law, that such rule should not be applied to male and fe-

male alike, when the removal of the latter's disability makes the general rule applicable.

As was said of a similar question in Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, the common law is not so unbending as to lead to this result. "The reason of the law is the essence and soul of the law." In Noyes v. Southworth, supra, it was said: "Our Constitution has done away with all disabilities of coverture, and expressly authorized every married woman to make wills of her estate as if she were sole. This leaves her case to be governed by the same rule which would apply to any one else on change of condition. * * * There is no sound reason that we can perceive why, in the absence of statute, implied revocations should be extended, or should be differently treated as between men and women, when the property rights of married women have ceased to be hampered by marriage."

But it is further insisted that, as section 9285 makes provision for a child born after the making of his father's will, the rule that marriage and birth of a child revokes a will previously made by the father is abrogated. It is contended that this provision applies only to a man's will, and it was so held in Cotheal v. Cotheal, 40 N. Y. 405; but it is at the same time urged that, inasmuch as the rule as applied to a woman's will is applied by analogy, it follows that if the statutes have abrogated the rule as to men it follows that the rule has to women no existence. This contention does not take account of the fact that we are to apply a principle of the common law, and that that principle is not affected by the withdrawal of a class of persons from those to be affected by its operation. We regard this principle of the common law as controlling, and hold that the marriage of the testatrix and subsequent birth of a child to her resulted in a revocation by operation of law.

The judgment is reversed, and a new trial ordered.

In re McLARNEY'S ESTATE.

(Court of Appeals of New York, 1897. 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664.)

O'BRIEN, J. The decree of the surrogate admitting the will of the deceased to probate is questioned upon one ground only, and that is that the will was revoked prior to the death of the testatrix.

The will was made on the 23d day of July, 1884, and the deceased was then a married woman, the wife of one Brophy, who died on the 29th of January, 1889. On the 5th of February, 1894, the testatrix, being then a widow, married the contestant, James E. McLarney, and she died on the 19th of April, following the marriage. There was no issue of either marriage.

When the will in question was made, the deceased was a married woman living with her husband; and the contention is that as she subsequently became a widow, and remarried, her last marriage operated to revoke the will previously made.

That the deceased made a valid will in writing is not disputed, and, in order to show a revocation, the burden was upon the contestant to bring the case within some provision of the statute which defines the cases in which written wills are deemed to be revoked. The statute provides that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." 2 Rev. St. p. 64, § 44. The deceased was not an unmarried woman when she made the will. She was a married woman, who subsequently became a widow, and remarried. The case is not therefore within the rule or the reason of the rule that the will of an unmarried female is revoked by her subsequent marriage.

The statute on this subject is simply declaratory of the common law. The marriage, as a general rule, vested the husband with the title to the property of the wife, and she lost her capacity to dispose of it by will or otherwise. Since a testamentary instrument, from its very nature, can operate only after death, and is subject to change during life, it was wholly inconsistent with the relations of husband and wife as they existed at common law when made by the wife before marriage. An instrument which disposed of her property after death, and which she was incapable of changing or revoking during coverture, could not legally exist under the rules of law that governed the marriage relations. It was supposed to be destructive of that complete unity of husband and wife which was the theory of the common law, and therefore upon her marriage it was deemed to be completely revoked.

The reason of the rule was very clearly stated by Lord Chancellor Thurlow in Hodsden v. Lloyd, 2 Brown, Ch. 534, as follows: "It is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix; and as, by the marriage, she disables herself from making any other will, this instrument ceases to be of that sort, and must be void."

This rule was incorporated in our statute law (2 Rev. St. p. 64, § 44) at the time when a married woman was incapable of making a will, and, of course, it was not intended to have any application whatever to testamentary instruments made during coverture. Since the disabilities of married women to dispose of property by will have been removed in this state by legislation, the reason of the rule no longer exists, though it remains a part of the statute law. It has been held by this court that it was not abrogated by the subsequent legislation conferring testamentary capacity upon married women, and removing the reason of the rule at common law. The courts cannot dispense with a statutory rule merely because it appears that the policy upon which it was established has ceased. The Legislature might very prop-

erly remove it from the statute book by repeal, but in the meantime it cannot be disregarded by the courts. Brown v. Clark, 77 N. Y. 369.

But it would seem to be clear that we ought not to extend the operation of an ancient rule when all the reasons upon which it was founded have passed away, or apply it to a case which was not originally within its terms or its general policy. After the long struggle in the courts, where it was assailed as a useless relic of the past, that had been swept away in the current of modern legislation, there is no good reason for giving it new life and vigor by deciding that it is still not only potent enough to annul the will of an unmarried female, but that of a married woman as well.

The courts of this state, when dealing with the subject of wills and their revocation, have always adhered closely to the terms of the statute. This is illustrated not only by the case above cited, but by others, notably where it was held that the provision of the statute which revokes a will in favor of an afterborn child had no application to the will of a married woman under the act of 1849. Cotheal v. Cotheal, 40 N. Y. 405. So, also, in a more recent case it was held that a will made by a widow was the testamentary act of an unmarried woman, and revoked by her subsequent marriage. In re Kaufman, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292.

In the case at bar the testatrix could have revoked her will at any time before her death, or could have made a new will, and hence none of the reasons upon which the statute was based have any application to this case.

The learned counsel for the contestant admits that he cannot succeed in this appeal unless the language of the act of 1849, removing the disabilities of married women, sustains his contention. By that statute a married woman is enabled "to convey and devise real and personal estate * * * in the same manner and with like effect as if she were unmarried." The argument is that, since the will of a married woman is to be made in the same manner and with like effect as if she were unmarried, the instrument must carry with it all the incidents and qualities that pertain to the will of a feme sole, including the possibility of revocation by a subsequent marriage.

This, we think, would be straining the words of the statute to ingraft upon it an ancient rule of revocation, that never had any application to the class of wills therein mentioned. The purpose of the act was to enable a married woman to make a will, and it had no reference to methods of revocation. A will has no effect whatever until death, and the words "like effect" relate to the instrument after it becomes effective by death. The meaning of the words is that, when the will of a married woman becomes operative by her death, it shall have the same effect—that is, the same disposing power and legal operation as an instrument for the transfer of the title to property—that it would had she never been married. Nothing was said or implied with respect to revocation. That subject was left to the general rules

of law applicable to all wills. If the legislature intended that her will should be deemed revoked in case of a second marriage, it would, no doubt, have said so. In the absence of some positive law, such a result cannot be ingrafted upon a statute, the primary purpose of which was to remove the common-law disabilities of marriage.

The judgment below was right, and should be affirmed, with costs. All concur, except GRAY, J., absent, and HAIGHT, J., dissenting. Judgment affirmed.[32]

MEANS v. URY.

(Supreme Court of North Carolina, 1906. 141 N. C. 248, 53 S. E. 850.)

BROWN, J. Cameline Means, while the wife of Ephriam Means, made her will, and some time thereafter, being a widow, married Jason Carr, and during such coverture verbally declared said paper writing to be her last will and testament without any further execution thereof, in accordance with the statute. The court below adjudged the paper writing not to be the last will and testament of Cameline Means, upon the ground that it was revoked by her subsequent marriage, and that her verbal declarations could not constitute a re-execution and republication of it.

We think the ruling sound. In respect to her capacity to make a will, the feme covert stands upon the same footing as the feme sole. Her will is revoked by a subsequent marriage, as much so as if she were a feme sole when she made it, and then married. The right of a married woman to make a will is guarantied by the Constitution, but that, in no way, affects the statute declaring that such a will may be revoked by another marriage contracted after the will was made. Revisal 1905, § 3116. Affirmed

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BALDWIN et al. v. SPRIGGS.

(Court of Appeals of Maryland, 1886. 65 Md. 373, 5 Atl. 295.)

Proceedings to probate a will claimed to have been revoked by the testator's subsequent marriage, and the birth of surviving issue. Decree for contestant, and proponent appeals.

STONE, J. There is no dispute about the material facts in this case. James Spriggs, of Anne Arundel county, on the twenty-fifth of July, 1865, duly executed his will. By that will he disposed of all the property, real and personal, which he then owned. James Spriggs, at the time of the execution of the said will, had a wife, Ruth Spriggs, then living, and several children by her also living. By his said will he de-

[32] See In re Comassi, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414 (1895).

vised all his property to said wife and children. His wife, Ruth, died in 1871, and said James, soon after the death of said Ruth, about 1874, intermarried with Maggie E. Vane, and also had by her several children. Said James Spriggs died in January, 1886, leaving a widow, the said Maggie E. Spriggs, and the children of both said Ruth and Maggie E. surviving him. After the execution of the will the said James Spriggs purchased certain other real estate which was unaffected by said will. His will, as to his real estate, contained no residuary clause, but disposed of all the real estate he owned at its date, by specific description. After the death of James Spriggs his will was offered for probate in the orphans' court of Anne Arundel county, and a caveat was filed thereto by his second wife, Maggie E. Spriggs, in behalf of herself and her children, and upon such caveat plenary proceedings were had, and the orphans' court ordered and decreed that said will was revoked by his subsequent marriage and the birth of issue, and refused to admit the paper to probate. From this decree the children of the first wife have appealed to this court.

These are all the facts necessary to elucidate the legal proposition which we are called upon to decide, and which is simply whether, upon this state of the facts, the will of James Spriggs has been revoked by operation of law. It would be a profitless task to review all the English cases on this subject. They may be found by the curious fully discussed by Chancellor Kent with his usual ability in the case of Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506. It is enough for us to say that, after a good deal of doubt and hesitation, it was finally settled in England, before our Revolution, that marriage and issue taken together did amount to an implied revocation of a will previously made, and that such implied revocations were not within the statute of frauds, but that such implied revocations might be rebutted and controlled by circumstances. The final determination of the matter seems to have been reached by the cases of Christopher v. Christopher (decided by the Court of Exchequer, Parker, C. B., presiding, in 1771) 2 Dickens, 445, and in the case of Spraage v. Stone (decided in 1773) Amb. 721. These cases appear to have definitely settled the law that a subsequent marriage and birth of a child, standing alone, and unaccompanied by other circumstances, amount to an implied revocation of a will.

The whole subject, says Chancellor Kent, has continued to receive great discussion in the English courts since the era of our Revolution, growing out of new cases constantly arising amidst the endless variety of human affairs. The most important of the English cases since the Revolution is the case of Marston v. Fox (decided in 1838 by 14 out of the 15 English judges) 8 Adol. & E. 14, where the general doctrine we have stated was reaffirmed. We will recur to this case again for another purpose. But we are not without decisive authority in our own state. The unreported case of Sedwick v. Sedwick, decided at June term, 1844, was a case similar to the one at bar. And the Court of Appeals decided that the subsequent marriage, and birth of a child,

did revoke the will, and they affirmed the decree of the orphans' court refusing it probate. No opinion was filed in the case, although a large amount of property was involved, and the case was argued by some of the most eminent counsel in Maryland. But they did flatly decide the question by a decree declaring the will revoked by the subsequent marriage and birth of a child.

But while such is the general rule, like other general rules, it has been held in England subject to some exceptions. Among the exceptions is the one where the testator has made provision for his children born after the execution of the will. As the origin of the rule was the duty of the parent to provide for his offspring, this exception seems right and proper. Another matter upon which the English courts have exercised themselves is the determination of the ground upon which the doctrine of implied revocation ought to be rested. This is of practical importance in this case, and will require some examination. Lord Mansfield, in the case of Brady v. Cubitt, 1 Doug. 31, thought the rule should rest on the presumption that the testator intended to revoke his will, and that it therefore followed that such presumption might be rebutted by even parol evidence,—to use his own words, that such presumption might be rebutted by "every sort of evidence." But Lord Mansfield's view seems to us irreconcilable with the statute of frauds. It would in effect allow the will to be revoked by the subsequent intention of the testator, without such intention being evidenced by the positive acts so expressly required by that statute.

That view leads to another difficulty: that the testator may change his first intention, and adopt a contrary one; and, if so, which of the two intentions is to prevail? The conclusion, however, that Lord Mansfield reached, that every sort of evidence was admissible, was but the logical consequence of the ground upon which he rested the rule; namely, that of presumed alteration of intention. This case was decided in 1778. But the courts there seem to have felt the difficulties that would result from such a view, and Lord Kenyon, in Doe v. Lancashire (decided in 1792) 5 Durn. & E. 49, placed the rule upon another ground; namely, a tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. This view of Lord Kenyon was afterwards adopted by Lord Ellenborough in the case of Kenebel v. Scrafton (decided in 1802) 2 East, 530. Finally, the court, in Marston v. Fox, heretofore cited, unanimously adopted the views of Lord Kenyon, and it may now be considered as settled in England that the doctrine of implied revocation rests upon the ground of a tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. In this we concur.

If we adopt the English rule, that the will is not revoked if the testator makes provision for the children of the subsequent marriage, the question arises in the case at bar whether he can be considered to have

made such provision by the purchase of the property acquired by him between the date of his will and his death. This question must be answered, both upon reason and authority, in the negative. The testator disposed of all the property he then owned, by his will; but he lived 20 years after its date, and in the meantime purchased other real estate, which the children of the second wife would share with those of the first. But the mere accumulation of additional property cannot, upon any ground of reason, be considered a provision made by the testator for the second set of children, any more than for the first set, as the latter are equally benefited by it. The injustice of considering after-acquired property a provision for the second children will be the more readily seen if we consider a case—and such have frequently occurred—where the beneficiaries under the will were comparative strangers, or remote collaterals. Again, if after-acquired property should be held a provision for the after-born children, how much property must be so acquired? It could hardly be said that the purchase of an acre of poor land, or a cow or horse, could be so considered; and, if not, by what rule should the value of such property be estimated?

But we are not without authority on this subject. In Marston v. Fox, above cited, the point was made that an after-purchased estate did not pass by the will, but descended to the son in fee, and thereby became a provision for him, and prevented the revocation; but, in answer to this objection, the court said: "In the first place, we answer that no case can be found in which after-acquired property descending upon a child has been allowed to have that effect; and, indeed, such a proposition seems incompatible with the nature of a condition annexed to the will."

To determine that after-acquired property was a provision for the after-born child would be totally inconsistent with the theory that the rule of implied revocation rests upon the tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. Instead of the change in the family, it would make a change in the property—one of the essential elements to determine the implied revocation. The will of the successful testator would stand; that of the unfortunate would be revoked.

Upon the whole case presented by the record before us, we are of opinion that the testator having disposed of the whole of the estate owned by him at the date of his will, and having again married, and had children by his second wife, and having made no provision for such children, that his will was revoked by operation of law, and that the order of the orphans' court must be affirmed; the costs to be paid out of the estate.[33]

[33] In Marston v. Roe d. Fox, 8 A. & E. 14 (1838), it was held that a provision for the intended wife only would not prevent revocation, but that such provision must also extend to the children of the marriage to have

In re GOODS OF CADYWOLD.

(Court of Probate, 1858. 1 Sw. & Tr. 34.)

T. C. died in 1857, leaving a duly executed will, dated the 29th March, 1828, whereof he appointed Elizabeth Soundy, spinster (afterwards Elizabeth Cadywold), his intended wife, and two others, executors.

By his will he devised all his real estate to E. Soundy, his intended wife, for life, and after her death he directed his executors to sell the same, and bequeathed the money to arise from such sale to and amongst all and every his child or children by his said intended wife living at his decease or born in due time afterwards, and the residue of his personal estate he bequeathed to Elizabeth Soundy, his intended wife, for her own use absolutely.

Subsequently to the execution of this will the deceased intermarried with Elizabeth Soundy, and died leaving his said wife and four children of the marriage him surviving. Mrs. Cadywold having been at first advised that the will was valid on the authority of Kenebel v. Scrafton, 2 East, 541, applied to the registry as executrix (the two other executors having renounced) for probate, and was there directed to make application to the court.

Dr. Addams, Q. C., said he was instructed to move for probate of this paper, but, the law being as held in Marston v. Roe d. Fox [8 A. & E. 14] and Israell v. Rodon [2 Moore, P. C. 51], he apprehended it could not be granted.

Sir C. CRESSWELL. It seems at first sight rather startling to say that a will like the present, executed in contemplation of marriage, and providing for the wife and children of the marriage, should be revoked by such marriage and the birth of a child; but on the cases you have cited, there is no doubt that the law so stands, and I must reject the motion for probate.[34]

INGERSOLL v. HOPKINS.

(Supreme Judicial Court of Massachusetts, 1898. 170 Mass. 401, 49 N. E. 623, 40 L. R. A. 191.)

FIELD, C. J. The will of Charles D. Ingersoll, of Boston, was executed on October 20, 1891, and in it he gave all his property to

that effect, and the descent upon the children of after-acquired property was not an equivalent. See, also, Israell v. Rodon, 2 Moore, P. C. 51 (1839), extending the doctrine of Marston v. Roe d. Fox from wills of realty to testaments of personalty.

[34] See Francis v. Marsh, 54 W. Va. 545, 46 S. E. 573 (1904). Compare Fry v. Fry, 125 Iowa, 424, 101 N. W. 144 (1904), where under the statute the birth of a legitimate child revokes a prior will, irrespective of whether provision is made for the child therein.

Mary Alice Payson, of said Boston, "single woman," and appointed her one of the executors, and requested that the executors "be required to give no sureties on their official bonds."

It appears from the testimony admitted by the justice who reported the case to this court, that the testator and Miss Payson were married on October 19, 1892; that the testator died on September 28, 1896; that prior to the time when the will was executed the testator and Miss Payson had mutually promised to marry each other; that the contract of marriage remained in force from the time of the engagement until the marriage; and that she lived with him as his wife from the time of the marriage until his death.

From this evidence in connection with the will the presiding justice found, as matter of fact, so far as he properly could, that it appears from the will itself "by fair inference from its provisions as applied to the parties and the subjects to which it relates, that the will was made in contemplation of the marriage that was subsequently solemnized," and he affirmed the decree of the probate court allowing the will.

The question of law in this case depends upon the construction to be given to St. 1892, c. 118, of which the first section is as follows: "The marriage of any person shall act as a revocation of any will made by such person previous to such marriage, unless it shall appear from the will itself that the will was made in contemplation of such marriage, or unless and except so far as the will is made in exercise of a power of appointment and the estate thereby appointed would not, in default of appointment, pass to the persons that would have been entitled to the same if it had been the testator's own estate, and he or she had died without disposing of it by will."

It is manifest, we think, that from the will itself, considered independently of the testimony admitted by the presiding justice, it does not appear that the will was made in contemplation of marriage with Miss Payson. It is impossible to hold, in every case where a testator by his will gives property or all his property to a woman who is unmarried and makes her his executrix, that it appears from this that at the time when he made the will he contemplated marrying her and made his will in contemplation of such marriage. It does not appear that there was any dispute or uncertainty as to the Mary Alice Payson intended, or that any evidence was necessary to identify her or the estate which was devised and bequeathed to her.

The evidence was admitted to show another fact existing at the time when the will was made, namely, that at that time the testator was under a contract of marriage with her, and then, by considering this fact in connection with the provisions of the will, the presiding justice drew the inference that the will was made in contemplation of the marriage with her which afterwards took place. It was in effect conceded by both sides that, although the will was made before St. 1892, c. 118, took effect, yet, as the marriage took place after the statute

took effect, the statute was applicable to the case. See Swan v. Sayles, 165 Mass. 177, 42 N. E. 570.

The counsel for the appellees cite the decisions of this court upon the construction of what is now Pub. St. c. 127, § 21, which section is as follows: "When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it appears that the omission was intentional and not occasioned by accident or mistake." Under the statutory provision which now constitutes this section the court held that parol evidence is admissible to show that the omission by a testator to provide in his will for any of his children or for the issue of a deceased child was intentional, and was not occasioned by accident or mistake. Converse v. Wales, 4 Allen, 512.

But the section does not require that it should appear from the will itself that the omission was intentional, and it well may be that the reason for using the different phraseology in St. 1892, c. 118, was that the Legislature did not intend to leave the question whether a will was made in contemplation of a marriage which subsequently took place to the uncertainty which often attends the proof of facts by oral evidence.

The counsel for the appellees also rely upon the construction which has been given to what is now Pub. St. c. 127, §§ 24, 25. Fay v. Fay, 1 Cush. 93. Brimmer v. Sohier, 1 Cush. 118. These sections are as follows:

"Sec. 24. Every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate.

"Sec. 25. An estate, right, or interest in lands acquired by a testator, after the making of his will, shall pass thereby in like manner as if possessed by him at the time when he made his will, if such manifestly and clearly appears by the will to have been the testator's intention."

The decisions are to the effect that the intention of the testator under these sections need not be declared in express terms in the will, but that it is sufficient if the intention can be clearly inferred from particular provisions of the will, or from its general scope and import. The decisions give no sanction to the doctrine that such intention can be shown by evidence other than that derived from the will itself.

The statute in England on the subject is as follows: "And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her

heir, customary heir, executor or administrator, or the person entitled as his or her next of kin, under the statute of distributions)." 1 Vict. c. 26, § 18.

There it is held that no intention of the testator, even though expressed in the will itself, can prevent the revocation of the will by a subsequent marriage. Otway v. Sadleir, 33 L. T. 46; In re Cadywold, 1 Sw. & Tr. 34; Jarm. Wills (6th Ed.) 110 et seq. Our statute follows closely the English statute, inserting only the exception, "unless it shall appear from the will itself that the will was made in contemplation of such marriage." The intention of our Legislature apparently was not to follow the English statute as interpreted by the English courts, when it appeared from the will itself that it was made in contemplation of a marriage which subsequently took place, but to follow it in other respects, and to exclude from consideration any evidence not derived from the will itself.

The statute of Georgia more nearly resembles ours, and it is there held that parol evidence cannot be received to show that the will was made "in contemplation of the event" of marriage or the birth of a child. Ellis v. Darden, 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51.

In the opinion of a majority of the court, St. 1892, c. 118, means that when the will is not made in the exercise of a power of appointment, it must be apparent on the face of the will itself that the will was made in contemplation of "such marriage," either by an express declaration in the will to that effect, or by language in the will from which such contemplation may fairly be inferred, otherwise a subsequent marriage "shall act as a revocation."

A decree should be entered that the decree of the probate court allowing the will be reversed, and that the will be disallowed, and the case remanded to the probate court for further proceedings. Decree accordingly.[35]

PHILLIPPE et al. v. CLEVENGER et al.

(Supreme Court of Illinois, 1909. 239 Ill. 117, 87 N. E. 858.)

HAND, J. This is an appeal from a decree of the circuit court of Champaign county, entered in a suit for the partition of certain lands of which John Phillippe, Jr., died seised, commenced by the appellants against the appellees, in so far as it disposes of the title to the west half of the southwest quarter of section 5, township 20 north, range 8 east of the third principal meridian, Champaign county, Ill.

[35] But under the Washington statute, where the will is not revoked if the wife be provided for in the will, a will is held not to be revoked where a testator marries the woman for whom he has therein provided as his "friend," even though it does not appear on the face of the will that it was made in contemplation of marriage. In re Adler's Estate, 52 Wash. 539, 100 Pac. 1019 (1909).

It appears from the record that in and by the fourth paragraph of his will, which bore date September 15, 1877, John Phillippe, Jr., devised to Nettie F. Clevenger, his daughter, in fee simple, the premises heretofore described; that on April 24, 1879, the said John Phillippe, Jr., by warranty deed, for and in consideration of love and affection, conveyed said premises to his said daughter, Nettie F. Clevenger, and she took possession of said premises; that on January 10, 1883, the said Nettie F. Clevenger, by warranty deed, for and in consideration of $3,000 to her in hand paid, reconveyed to said John Phillipe, Jr., the said premises, and surrendered possession thereof to him, and that John Phillippe, Jr., was in possession of and seised in fee simple of said premises at the time of his death, which occurred on November 10, 1884; that the fifth paragraph of the will of said John Phillippe, Jr., gave the use of all the estate of which he died seised which had not been specifically devised to his wife, Susan J. Phillippe, during her natural life, and that she took possession of his estate, including the premises devised to Nettie F. Clevenger, and had possession thereof until her death, which took place on March 7, 1907; that by the sixth paragraph of his will John Phillippe, Jr., provided that the residue of his estate, both real and personal, upon the death of Susan J. Phillippe, should be equally divided between his children, Mary F. Scroggins, Mathew A. Phillippe, John F. Phillippe, and Nettie F. Clevenger, and the children of a deceased daughter, Melissa J. Buckles, the said grandchildren to take their mother's share.

The trial court held that Nettie F. Clevenger took the fee title, absolutely, to the premises devised to her by paragraph 4 of the will, and the only question here presented for determination is the correctness of the decision of the trial court in that regard; it being the contention of the appellants that by the conveyance of said premises by John Phillippe, Jr., to Nettie F. Clevenger, during his lifetime, paragraph 4 of his will was revoked, and that said provision of the will was not revived by the reconveyance of said premises to John Phillippe, Jr., and that the premises described in said paragraph 4 of the will passed to his children and grandchildren under the sixth paragraph of the will as a part of the residuum of his estate, or to them as intestate property.

It seems to be well settled by the common law of England that a conveyance by a testator of lands which he has specifically devised by his will revokes the will as to said lands (30 Am. & Eng. Ency. of Law [2d Ed.] p. 652; 1 Underhill on Wills, § 415; 1 Jarman on Wills, c. 7, § 3; 4 Kent's Com. p. 528), and that a specific devise of lands is not revived by reason of the fact that the testator subsequently acquires title to the lands conveyed (30 Am. & Eng. Ency. of Law [2d Ed.] p. 654; 4 Kent's Com. p. 529; 1 Jarman on Wills, p. 147). The question here involved is therefore narrowed to the question whether those rules of the common law are in force in this state.

The common law of England, so far as the same is applicable and of a general nature, is in force in this state with reference to the revocation and revival of wills, except in so far as it has been repealed by statute. Hurd's Rev. St. 1908, c. 28, § 1; Stetson v. Stetson, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258.

It is, however, contended by Nettie F. Clevenger that the common law in regard to the revocation of wills by implication is repealed in this state by paragraph 17 of the wills act (3 Starr & C. Ann. St. 1896, p. 4044, c. 148), which reads as follows: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

The paragraph of the statute referred to has been in force in this state since the enactment of the Revised Statutes of 1845, and in a number of cases decided by this court since that time wills have been held to have been revoked, in whole or in part, by the acts of the maker of the will which do not fall within the provisions of said paragraph 17; that is, they have been held to have been revoked by implication. Tyler v. Tyler, 19 Ill. 151; In re Tuller, 79 Ill. 99, 22 Am. Rep. 164; Updike v. Tompkins, 100 Ill. 406; Duryea v. Duryea, 85 Ill. 41; American Board of Commissioners for Foreign Missions v. Nelson, 72 Ill. 564.

The ground upon which the courts hold a will to be revoked by implication is that the acts of the testator subsequent to its execution show an intention inconsistent with the will; in other words, his acts show an intention that his will is not to be carried out as originally drawn. In the Tyler Case, where the marriage of the testator took place subsequent to the execution of his will, and where there was no child or the descendant of a child, it was held in the absence of facts arising subsequent to the marriage which showed an intention to die testate, that the will was presumed to be revoked by the marriage. To the same effect is Duryea v. Duryea, supra.

We think it clear, therefore, that paragraph 17 of the wills act only applies to the revocation of a will where there is an express intention on the part of the testator to revoke a will, and that said section does not apply to the revocation of a will, or a part thereof, arising by implication of law from the acts of the testator which show such a change in the condition of his estate as to raise a presumption that he intended to revoke a part or the whole of his will. Section 6 of the English statute of frauds (8 Pickering's Stat. at Large, p. 406), which is, in substance, the same as section 17 of the wills act in force in this state, was in force in England at the time the rule was estab-

lished in that country that a will, or a part thereof, could be revoked by implication. We are therefore forced to the conclusion that the doctrine of the revocation of a will, or a part thereof, by implication, is not abrogated by statute in this state.

We therefore hold that by the conveyance of the premises in question to Nettie F. Clevenger by the testator the fourth paragraph of the will of John Phillippe, Jr., was revoked, and that as he never republished his will after the premises were reconveyed to him, in accordance with the statute pointing out the manner in which wills are to be executed, that paragraph of the will was not revived by a reconveyance of the premises to him by his daughter. To hold otherwise would be to hold it was the intention of the testator that his daughter, Nettie F. Clevenger, was to have the 80-acre tract of land mentioned in paragraph 4 of the will, and $3,000 in cash in addition thereto, while the will shows upon its face that it was manifestly the intention of the testator that his said daughter should only be preferred over her brothers and sisters, in the division of her father's estate, to the extent of the 80 acres of land.

The question whether the premises covered by the fourth paragraph of the will, if that provision of the will is held to have been revoked, passed to the persons named in paragraph 6 of the will as the devisees of John Phillippe, Jr., as a part of the residuum of his estate, or to the same persons as heirs at law of said John Phillippe, Jr., is immaterial and need not be decided, as said devisees and the heirs at law of John Phillippe, Jr., are the same persons, and the interests which they would take in said 80 acres of land, either as devisees under the will or under the law as heirs, is the same.

The decree of the circuit court will be reversed, and the cause remanded to that court, with directions to overrule the demurrer of Nettie F. Clevenger to the bill filed in this case for the partition of said 80-acre tract of land. Reversed and remanded, with directions.[86]

[86] See Hattersley v. Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532 (1893); Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456 (1823). But see Woolery v. Woolery, 48 Ind. 523 (1874); Morey v. Sohier, 63 N. H. 507, 3 Atl. 636, 56 Am. Rep. 538 (1885). In Bethany Hospital Co. v. Philippi (Kan.) 107 Pac. 530 (1910), a deed of a person known by the grantee to be insane was held not to effect a revocation. So it has been held that a conveyance set aside as having been obtained from the grantor by undue influence cannot operate as an implied revocation of his will. Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339 (1891). See, also, 28 Am. St. Rep. 356–358, note.

The mistake of the decision in Phillippe v. Clevenger, supra, lies in treating the case as one of revocation rather than as one of attempted but uncompleted ademption. The cases on ademption are treated elsewhere herein. See p. 728 ff.,

"Nearly all the jurisdictions in which common law is in force have framed statutes to the effect that no alteration in the estate of testator in property devised or bequeathed shall effect a revocation of his will as to such, unless he is wholly divested of his interest therein, or unless in the instrument by which such alteration is made, he declares his intention that it shall operate as a revocation of such previous devise." Page on Wills, § 279.

WARNER v. BEACH.

(Supreme Judicial Court of Massachusetts, 1855. 4 Gray, 162.)

SHAW, C. J.[37] * * * 2. The only other circumstances, intimated as ground of revocation of this will, are the increase in value of the real estate, and the long continued insanity of the testator, which disabled him from altering his will. The former circumstances alone would have no weight; and it is only the great length of time,[38] during which this disability lasted, which appears to give it any plausibility. It is said that a will is ambulatory during the life of the testator, because he may at any time alter or change it. If this could be held to mean that he must always have the capacity to revoke, it would follow that any attack of insanity would operate as a revocation, which would prove far too much. And we have no law, no rule or maxim, intimating a distinction in this respect between the existence of insanity for a longer or shorter period of duration.

No case was cited by the counsel, and we are aware of none, where any insanity after making a will is held to revoke the will. In Forse v. Hembling's Case, 4 Co. 61b, the court, in commenting upon the ambulatory character of a will, to the end of life, suspended in case of a woman who makes a will and marries, and thus by her own act is disqualified by the disability of coverture, say: "It would be against the nature of a will to be so absolute, that he who makes it, being of good and perfect memory, cannot countermand it. But when a man of sound memory makes his will, and afterwards, by the visitation of God, becomes of unsound memory (as every man, for the most part, before his death is), God forbid that this act of God should be in law a revocation of his will, which he made when he was of good and perfect memory." This was not an adjudicated point in the case; but it was put by way of illustration, as an unquestionable rule of law, and, as such, is an authority entitled to respect.

The court are of opinion, that the decision of the probate court, adjudging the will of Clark Cooley, under the circumstances, not to have been revoked, was correct, and that the decree allowing and admitting it to probate must be affirmed. Decree affirmed.

[37] Part only of the opinion is given.

[38] Over thirty years.

HOITT v. HOITT.

(Supreme Court of New Hampshire, 1886. 63 N. H. 475, 3 Atl. 604, 56 Am. Rep. 530.)

BLODGETT, J.[39] No express revocation appears in this case. * * * Fellows v. Allen, 60 N. H. 439, 441, 49 Am. Rep. 328, is a recent and direct authority that the fact of a will being found among worthless papers works no revocation of it. * * *

Neither has the will become inoperative, as a whole, from necessity, either by an entire loss of the testator's estate, or its total alienation, or by the decease of all the devisees without descendants, and so leaving nothing upon which it can operate. If, therefore, there has been a valid revocation, it must be one arising from legal presumption or implication; and this in fact is the principal contention.

The existing statute as to the revocation of wills, which was originally adopted in 1822, after pointing out the modes by which a will may be revoked, expressly excepts any revocation implied by law from changes in the circumstances of the testator, his family, devisees, or estate, occurring between the time of making the will and his death. Gen. Laws, c. 193, §§ 14, 15. But what these changes are, section 15 does not in any manner attempt to define; and the effect consequently is to leave the matter of revocation by legal implication just as it stood before the enactment of that section. * * *

No new cause of revocation being introduced by the statute, the true inquiry is whether the facts of this case bring it within any of the exceptions upon the subject of implied revocation recognized by the English courts after the adoption of the statute of 1676, which were quite limited in number, and reasonably well defined and understood at the time our statute was enacted. The causes assigned upon this point as ground of revocation are subsequent changes in the circumstances of the deceased, his family and estate. They are, substantially, the death of his wife and his son Franklin, both of whom were legatees; his second marriage, but without issue; the alienation of the larger portion of his estate; and its nearly threefold increase in value through natural causes and judicious investments.

But total revocation cannot be implied from the death of the wife and the son. "The death of a devisee is a contingency always in view." Shaw, C. J., in Warner v. Beach, 4 Gray (Mass.) 162, 164. "I know of no case," said Denman, C. J., in Doe v. Edlin, 4 Adol. & E. 586, "where it has been held that the removal of an object of affection and bounty, by death, has been taken to be an implied revocation of a will, and, in my opinion, it does not operate so." And see Fellows v. Allen, supra.

Nor can it be implied from the testator's remarriage, because the indispensable common-law requisite of the subsequent birth of a child

[39] The statement of facts is omitted, and part only of the opinion is given.

is lacking. 1 Jarm. Wills (5th Amer. Ed.) 272; 1 Redf. Wills, 293; Pars. Wills, *59; Worth. Wills, *528. "This principle of law is incontrovertibly established." 4 Kent, Comm. 522. And in this connection it should also be borne in mind that the rule never applied except in cases where the wife and after-born children, the new objects of duty, were wholly unprovided for in the will, and where there was an entire disposition of the whole estate to their exclusion and prejudice; therefore, inasmuch as the widow and children of a testator not provided for in the will are, under our statute, entitled to the same share of the estate as if he had died intestate, the sole reason upon which the rule was grounded no longer exists, and so the rule itself has become inoperative and obsolete in this jurisdiction.

The inquiry thus becomes restricted to the effect of the changes in the testator's property; the phrase "circumstances of the testator," etc., relating to new family ties, and not to changes in property. 4 Kent, Comm. 521, and authorities generally. But if it were apparent, as it certainly is not, that in the case of a testator an entire revocation by legal implication resulted, either before or after the statute of 1676, from any change whatever of condition or circumstances except that of a subsequent marriage and child, it is the undoubted general rule that a partial revocation only produces what is inaptly and inaccurately termed a revocation pro tanto, instead of an ademption, of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not, however, by reason of any defect in the will itself, but because it pleased the testator to make a disposition of such part of his estate different from what he originally intended, which it is always competent for him to do either by a conveyance, or a new will or codicil. See Fellows v. Allen, supra; Carter v. Thomas, 4 Greenl. (Me.) 341, 343, 344; Graves v. Sheldon, 2 D. Chip. (Vt.) 71, 75, 15 Am. Dec. 653; Blandin v. Blandin, 9 Vt. 210, 211; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; Terry v. Edminster, 9 Pick. (Mass.) 355, note; Webster v. Webster, 105 Mass. 538, 542; Balliet's Appeal, 14 Pa. 451; Brush v. Brush, 11 Ohio, 287; Floyd v. Floyd, 7 B. Mon. (Ky.) 290; In re Nan Mickel, 14 Johns. (N. Y.) 324; McNaughton v. McNaughton, 34 N. Y. 201; Warren v. Taylor, 56 Iowa, 182, 9 N. W. 128; Wells v. Wells, 35 Miss. 638; Brydges v. Duchess of Chandos, 2 Ves. Jr. 417; 4 Dane, Abr. 576, 577; Love. Wills, 358; 1 Redf. Wills, 335; Pars. Wills, 63. "Conveying a part of the estate, upon which the will would otherwise operate, indicates a change of purpose in the testator as to that part; but suffering the will to remain uncanceled evinces that his intention is unchanged with respect to other property bequeathed or devised therein." Weston, J., in Carter v. Thomas, 4 Greenl. (Me.) 344.

The remaining circumstance, that of the increase of the estate, upon obvious considerations of public policy, has no weight; and to this effect is the great preponderance of authority. Warner v. Beach,

Webster v. Webster, Graves v. Sheldon, Blandin v. Blandin, and Balliet's Appeal, supra; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 507, 518, 519; Wogan v. Small, 11 Serg. & R. (Pa.) 141, 145; Vandemark v. Vandemark, 26 Barb. (N. Y.) 416; Verdier v. Verdier, 8 Rich. Law (S. C.) 135. "A merely general change in the testator's circumstances, as it regards the amount and relative value of his property, will not in general, if ever, have the effect to revoke a will, since the testator, by suffering it to remain uncanceled, does in effect reaffirm it, from day to day, until the termination of his conscious existence." 1 Redf. Wills, 298.

The conclusion, then, is that the subsequent changes in the circumstances of the testator, his family and estate, do not imply a revocation of his will. To effect a revocation both the English and New Hampshire statutes require certain specified things, which are lacking in this case, to be done, and not merely contemplated or even actually intended to be done. * * *

The rule for which the appellee contends is that a revocation may be proved or disproved by any circumstantial evidence showing the testator's intention; but the precedents do not support the contention. On the contrary, after a most thorough examination of the cases reported before the enactment of the New Hampshire statute, it was unanimously held in Marston v. Roe, 8 Adol. & E. 14, by the 14 judges sitting in the cause, that implied revocation takes place in consequence of a rule or principle of law, independently altogether of any question of intention; and there is no reason to suppose that the Legislature of 1822 took a different view of the reported cases. If their purpose was to make intention of itself a ground of revocation, and thus inevitably invite litigation and "produce infinite uncertainty and delay in the settlement of estates," the presumption is that the statute would have been drawn accordingly.

Even Johnston v. Johnston, 1 Phillim. 447, upon which great stress has been laid by the appellee, while holding the subsequent birth of a portionless child to be an indispensable requisite which would effect a revocation when aided by other circumstances, and a subsequent marriage not to be an essential requisite, does not hold that the revoking intent may be inferred from a general change of circumstances simply, but makes the controlling principle rest upon new moral obligations and family ties arising after the making of the will, and thus limits its application to cases of subsequent marriage or birth in which the wife or child would otherwise be left without provision for support. This case, however, is not relevant, the will being one of personalty only, and the decision being made by an ecclesiastical court, unincumbered by statute provisions; and if it were relevant, its governing principle, when applied to this case, would be fatal to the appellee, for the reason that no child was born to the testator subsequently to the execution of his will.

This being so, it is of no practical consequence here whether the doctrine of implied revocation rests upon the fact of a changed intention, as held in Johnston v. Johnston, or takes place in consequence of a rule or principle of law founded on a tacit condition annexed to the will itself when made, independently altogether of any question of intention, as held in Marston v. Roe; for the application of either principle to the facts of this case leaves the will unrevoked, because they fail to bring it within any of the exceptions introduced by the ecclesiastical or common-law courts. * * *

The proffered oral declarations of the testator to the effect that he understood the will was revoked, were rightly rejected. The mere understanding of a testator cannot revoke his will, for legal requirements cannot be thus abrogated; nor can his oral declarations, for wills cannot be revoked by parol; nor, upon the great weight of authority, are such declarations evidence, unless they accompany some act of revocation, and thereby become a part of the res gestæ. Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; Dan v. Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; Clark v. Smith, 34 Barb. (N. Y.) 140; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Randall v. Beatty, 31 N. J. Eq. 643; Lewis v. Lewis, 2 Watts & S. (Pa.) 455; Hargroves v. Redd, 43 Ga. 142, 160; Gay v. Gay, 60 Iowa, 415, 14 N. W. 238, 46 Am. Rep. 78; Rodgers v. Rodgers, 6 Heisk. (Tenn.) 489; Smith v. Fenner, 1 Gall. 170, Fed. Cas. No. 13,046; Doe v. Palmer, 16 Adol. & E. 747; 2 Greenl. Ev. (9th Ed.) § 690; Abb. Tr. Ev. 124; 2 Starkie, Ev. (3d Ed.) 1286; 1 Redf. Wills, 331.

Such declarations, also, were not competent, upon the testator's intention not to pass by his will after-required real estate. If a contrary intent is inferable from the will itself, it cannot be disproved by extrinsic evidence. If it is not thus inferable, and may be ascertained by the weight of competent evidence, his declarations are not a part of such evidence.

Decree of the probate court reversed. Will allowed.

HILPIRE v. CLAUDE et al.

(Supreme Court of Iowa, 1899. 109 Iowa, 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524.)

GIVEN, J.[40] * * * 5. Having found that under the Code of 1873 the subsequent birth of a legitimate child to the testator before his death operated as a revocation of his prior wills, we now inquire whether the adoption of a child has the same effect. This question is before this court for the first time, and, owing to differences in the statutes of this and other states, we find but little aid in the deci-

[40] Part only of the opinion is given.

sions of other courts. The language of our statutes is very broad, the adoption conferring upon the adopted child, "all the rights, privileges, and responsibilities, which would pertain to the child if born to the person adopting it in lawful wedlock." Code 1873, § 2307. As if to emphasize this language, it is further provided that "the rights, duties and relations between the parent and child by adoption, shall, thereafter [i. e., after the execution, acknowledgment, and filing of record of such instrument], in all respects, including the right of inheritance, be the same that exists by law between parent and child by lawful birth." Id., § 2310.

Plaintiff cites several cases wherein the right of adopted children to inherit from and through the adopting parent was passed upon, but in none of them is the question before us considered. In Wagner v. Varner, 50 Iowa, 532, it was held that the adopted child could inherit from his natural parents. In Warren v. Prescott, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370, it was held that an adopted child can take a legacy given to one of its adopting parents, and thus prevent the legacy from lapsing when the legatee dies before the testator. Other cases cited are equally foreign to the question under consideration.

This question was directly considered in Davis v. Fogle, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485. The court says: "The question presented for decision is, does the adoption of a child, under the statute of this state, operate to revoke an antecedent will of the adopting father, he having made no provision in the will or otherwise for such adopted child?" The statute of that state provides that from and after adoption such child "shall be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent, or otherwise, that such child would do if the natural heir of such adopted father or mother." Rev. St. 1881, § 825. It is said, "But we think the statute relating to the revocation of wills is decisive of the question involved in this case;" and it was held that as that statute did not provide that the adoption of a child should operate as a revocation of a prior will, and as revocations can be only made as provided, the will was not revoked by the adoption of the child.

We have seen that, under the Code of 1873, revocations of wills were not limited to the modes provided in section 2329. Therefore the Case of Davis is not authority for the same conclusion in this case. The same is true of In re Gregory's Estate, 15 Misc. Rep. 407, 37 N. Y. Supp. 925. The statute under consideration in that case contained several exceptions to the child's right to inherit, while ours contains none. In Re Comassi's Estate, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414, a married woman had executed her will, and thereafter, and after the death of her husband, remarried; and the question was whether her marriage had the effect of revoking her will, under a certain statute, and it was held that it did not. The will was contested by a child that had been adopted prior to its execution, and solely

upon the claim that the marriage revoked it. In Davis v. King, 89 N. C. 441, the question was whether a petition and decree of court whereby Richard W. King adopted his illegitimate son were admissible in evidence to show a revocation of the will offered for probate. The court held that wills could only be revoked as provided by statute, and that as the transcript offered did not purport to be a testamentary paper, nor to contain revocatory words, it was inadmissible.

In Re Sunderland's Estate, 60 Iowa, 732, 13 N. W. 655, the child was adopted by W. P. Sunderland and wife under a special act of the General Assembly of Louisiana providing that the child shall inherit from the adopting parents, "as if she were their legitimate child, without prejudice to forced heirs, if any there be." Laws 1860, p. 131. It was also provided that, should the child survive the parents and die without issue, then all the property she may have inherited from either of said parents should pass to the heirs of said parents. W. P. was the son of John Sunderland, and died before his father. The adopted child claimed that, as child of W. P., she was entitled to inherit his share of his father's estate, under section 2454 of the Code of Iowa of 1873, which is as follows: "Grandchildren. If any one of his children be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed in the same manner as though such child had outlived his parents." This court, resting the case solely upon said special act, held that the adopted child had no right to share in the estate of John Sunderland.

In Sewall v. Roberts, 115 Mass. 262, A. had in 1825 made a voluntary conveyance (without reserving any power of revocation) of personal property to an annuity company in trust to pay the income to him for life, and upon his death to be transferred to his administrator in trust for the special use and benefit of his children, and, in case he died without issue, then to his mother, if she survived him, and, if not, then to his or her heirs equally. In 1865 he adopted a child. "Held, also, that the adopted child took the remainder of the property as a 'child,' under the settlement, as one of the legal consequences and incidents of the natural relation of parents and children."

It is manifest that these cases fall short of determining the question under consideration, and we are not referred to, nor do we find, any one that does. Our statute, in declaring the rights of adopted children, does not contain any exceptions, as do those to which our attention has been called, and it is difficult to conceive of language that would more clearly place them upon the same level in all respects with children of lawful birth. The reasons for the rule that subsequent birth of a legitimate child to the testator before his death operates as a revocation of his prior will apply with equal force to a subsequent adoption under a statute like ours, containing no exceptions or qualifications, and declaring that the rights, duties, and relations between parent and child by adoption shall "in all respects, including the right of inheritance, be the same that exist by law between parent and child

by lawful birth." While these relations and rights are statutory, and may not be enlarged beyond the plain meaning of the statute, that meaning should not be defeated by any strained construction.

We conclude that it is the legislative intention to place adopted children upon the same level as children of lawful birth, in all respects and therefore that the decree of the district court should be reversed.[41]

In re HALL'S ESTATE.

DONALDSON v. HALL et al. (HALL, Intervener).

(Supreme Court of Minnesota, 1909. 106 Minn. 502, 119 N. W. 219, 20 L. R. A. [N. S.] 1073.)

BROWN, J. The facts in this case, as disclosed by the findings of the trial court, are as follows:

In 1893 George W. Hall, then a widower about 56 years of age, with several children, intermarried with Matilda Hall, appellant herein, who was about 30 years of age, and thereafter they continued to live together as husband and wife until some time in October, 1906, when a separation took place. No children were born to them. Subsequent to the marriage, in April, 1904, Hall duly made and executed his last will and testament, in and by which, after directing the payment of his just debts and funeral expenses, he granted, devised, and bequeathed "unto my wife, Matilda Hall, one-third of the remainder of my property, both personal and real, which shall remain after the payment of my debts aforesaid," one-sixth of what was left to certain daughters by his former wife, and the remainder, after the payment of certain specified legacies, to his sons of the former marriage.

Thereafter, in October, 1906, Hall commenced an action for divorce, charging his wife with adultery, in which she answered, denying the charge made against her. During the pendency of this action the parties, guided by their attorneys, entered into certain negotiations for the settlement of their property rights in the event a divorce was granted in the pending action. By the arrangement then made Hall agreed to pay to his wife the sum of $4,225 in money and to convey to her certain real estate in the city of Hutchinson, and the wife agreed to convey to him a small tract of land near Stewart, their place of residence. The deeds were duly executed, and the money so agreed to be paid delivered to a third person, to be by him delivered to the parties in accordance with the terms of the settlement immediately upon the entry of a decree of divorce. It was further understood and agreed, as a part of the settlement, that the wife should amend her answer in the divorce action by including therein a cross-bill for a

[41] See, also, Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258 (1901); Sandon v. Sandon, 123 Wis. 603, 101 N. W. 1089 (1905).

divorce against plaintiff on the general ground of his habitual drunkenness. Thereafter her answer was duly amended accordingly. The cause was brought on for trial, and resulted in a decree of divorce based upon the allegations of defendant's cross-bill.

The settlement of the property rights was then completed by the payment to the wife of the money and the delivery of the deeds of the property referred to. This was completed on May 1, 1907. Mrs. Hall claimed no alimony on the final hearing of the divorce case, and the judgment therein awarded to her no pecuniary relief, not even the costs of the action. The amount received by Mrs. Hall on the settlement amounted to practically one-third of the property then owned by Hall. Thereafter, on June 22, 1907, 30 days after the divorce and settlement, Hall, without having made any change or modification of his will, by which he gave to "my wife, Matilda Hall," one-third of all his property, suddenly died. C. R. Donaldson was named in the will as executor, and he properly presented it to the probate court for allowance and probate.

At the hearing of his petition certain of the children of deceased appeared and contested the allowance of that part of the will devising and bequeathing to Mrs. Hall one-third of testator's property, on the ground that the will in that respect was, by the settlement and adjustment of the property rights of the parties in the divorce action, revoked and annulled by implication of law. Mrs. Hall also appeared as intervener and claimed under the will. The probate court sustained the contention of contestants, holding that the provisions made for Mrs. Hall were revoked by operation of law, but admitted the balance of the will to probate. Mrs. Hall appealed to the district court, where the same conclusion was reached, and she then appealed to this court from an order of the district court denying her motion for a new trial.

The assignments of error challenge certain of the findings of the trial court and raise the single question whether the divorce and property settlement operated by implication of law to revoke the provisions made in deceased's will for his wife. Our examination of the record leads to the conclusion that all the findings of fact are sustained by the evidence. It would serve no useful purpose to enter into an extended discussion of the evidence, and we therefore refrain.

We come, then, directly to the main question in the case, namely, whether Hall's will was, to the extent of the provisions therein made for his wife, revoked by implication of law. An express revocation of a will involves an inquiry into the intention of the testator, and generally the manner and what acts will constitute a revocation in fact are expressly prescribed by statute. Page on Wills, 272; 2 Current Law, 2091; In re Knapen's Will, 75 Vt. 146, 53 Atl. 1003, 98 Am. St. Rep. 808; Rev. Laws 1905, § 3665.

At common law certain changes in the condition and circumstances of the testator worked a revocation by implication, and it was formerly held that this was prima facie only, and open to rebuttal by proof

that the testator intended his will to remain, notwithstanding the change in his circumstances. The rule, however, by all modern authorities, is that the presumption of law arising from the changed conditions is conclusive, and no evidence is admissible to rebut it. Marsh v. Roe, 8 Ad. & El. 14; Gay v. Gay, 84 Ala. 44, 4 South. 42; Hoitt v. Hoitt, 63 N. H. 498, 3 Atl. 604, 56 Am. Rep. 530; Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. St. Rep. 124; 30 Am. & Eng. Ency. Law, 644, and cases cited.

The rule had its origin with the ecclesiastical courts of England, and was later adopted as a part of the common law. 4 Kent's Comm. 775; Brody v. Cubit, Dang. 31. And it is the settled law in nearly all the states of this country, where not abrogated by statute. 30 Am. & Eng. Ency. Law, 643. Our statutes on the subject provide that no will shall be revoked, except in the manner there pointed out, namely, by some other writing executed by the testator with the same formalities with which the will itself is required to be executed, or by burning, obliterating, or destroying the same with the intention of revoking it, or by the destruction thereof by a third person at the request of the testator and in the presence of witnesses. To these restrictions is added, "But nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator," by which the common-law rule of implied revocation is affirmatively adopted as the law of this state. Rev. Laws 1905, § 3665.

Counsel for appellant do not contend that the common law is not in force in this state, but do claim that the facts here presented do not bring the case within the rule as properly understood and limited. There is much conflict in the adjudicated cases, both in England and in this country, as to the scope and limitations of the rule. In other words, authorities are not agreed respecting the character of the "change in the condition and circumstances of the testator" essential to give rise to the legal presumption of revocation. Some courts have restricted the rule to marriage and birth of issue in the case of a man, and mere marriage in the case of a woman. Wogan v. Small, 11 Serg. & R. (Pa.) 141; Jones' Estate, 211 Pa. 364, 60 Atl. 915, 69 L. R. A. 940, 107 Am. St. Rep. 581; Page on Wills, 280. Chancellor Kent gives a broad and comprehensive definition of the rule in the following language: "Implied revocations are founded upon the reasonable presumption of an alteration of the testator's mind arising from conditions since the making of the will, producing a change in his previous obligations and duties." 4 Kent, Comm. 521.

While cases involving a changed condition resulting from the marriage of the testator or testatrix have been before the courts most frequently, and new conditions so brought about have received the most attention, the authorities generally do not limit the application of the rule to a state of affairs thus created. To restrict the rule to such cases would narrow and unduly circumscribe its purpose. The differ-

ent conditions which bring the rule into operation are fully given, and authorities cited, in a valuable note to Graham v. Burch, 28 Am. St. Rep. 344 (47 Minn. 171, 49 N. W. 697). It is there stated that a revocation by implication may result from a change in the property of the testator, or from a change in his family, as by marriage, or in the beneficiaries named in his will. See, also, 30 Am. & Eng. Ency. Law, 644 et seq.

Of course, a change in respect to property or family relations resulting from the act of the testator should be of a nature to justify the inference, arbitrary though it be, that he intended to revoke his will, either in whole or in part, or that a moral or legal duty not only would require but prompt a change in the disposition of his property from that made in the will. In other words, the rule, if accorded substance and merit, must serve the purpose of doing by implication what the testator should, in justice to those entitled to his bounty, have done, had his attention been directly called to the matter after the change of circumstances and before his death. The rule, it is true, has not generally been extended so far. At least the tendency of the reported cases has been to restrict, rather than enlarge, its scope.

It was formerly held that the marriage of a man did not at common law revoke his will, whether executed before marriage or during the continuance of a previous marriage. Christopher v. Christopher, 4 Burr. 2182; Bowers v. Bowers, 53 Ind. 430; Goodsell's Appeal, 55 Conn. 171, 10 Atl. 557. But that doctrine has been modified, either by statute or decisions of the courts, both in England and the several states in this country. While within the application of the rule the marriage of a man did not of itself revoke his pre-existing will, his marriage and birth of issue did so operate. Note to Young's Appeal, 80 Am. Dec. 518. The marriage of a woman, however, has always been held to revoke her will, without reference to the birth of issue, and this because of her legal incapacity after marriage to dispose of her property. But this has also been changed by statute. Kelly v. Stevenson, 85 Minn. 247, 88 N. W. 739, 56 L. R. A. 754, 89 Am. St. Rep. 545. But, as already suggested, the courts are not in full harmony in defining the scope of the "changed conditions and circumstances" giving rise to the rule of implied revocation.

Counsel for appellant in the case at bar insist that it should be limited to such changes as arise from the marriage of the man and the subsequent birth of issue, and to that arising from the marriage of the woman with or without subsequent issue. If we adopt counsel's suggestion, and limit the rule to the instances mentioned, then the saving clause of the statute above quoted would have nothing whatever to act upon, for by section 3666, Rev. Laws 1905, it is expressly declared that the marriage of the testator, and this necessarily includes man or woman, shall revoke a previously executed will. No reference is made to the birth of issue. Simple marriage annuls a previous testamentary disposition of property. So that, if counsel's

contention be sound, the clause in section 3665, reserving the common-law rule of revocation by implication, would serve no purpose. We must therefore look further, and inquire whether the facts here disclosed, the divorce and property settlement, bring the case within the rule.

Very few cases are found where the precise question has been presented or decided, though it seems to be settled that a divorce alone does not revoke a previously executed will. In re Brown's Estate, 139 Iowa, 219, 117 N. W. 260; Baacke v. Baacke, 50 Neb. 21, 69 N. W. 303; Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; Jones' Estate, 211 Pa. 364, 60 Atl. 915, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Am. & Eng. Ann. Cas. 221, and note; Card v. Alexander, 48 Conn. 492, 40 Am. Rep. 187; In re Broddington, 22 Ch. D. 597, 25 Ch. D. 685. It is probable that a divorce granted at the suit of the wife, with alimony expressly decreed to be in lieu of all her rights in the property of the husband, testamentary and otherwise, would by implication of law revoke the will of her husband in so far as it made provision for her (1 Underhill on Wills, 265), though In re Brown's Estate, 139 Iowa, 219, 117 N. W. 260, seems to hold otherwise.

Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, and Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303, are the only cases to which our attention has been called where facts like those in the case at bar have been passed upon. In the Michigan case it was held that when, at the time a decree of divorce is granted, the parties to the action settle and adjust their property rights by mutual agreement, without mentioning wills theretofore made by them, the decree of divorce and settlement constituted an implied revocation of the wills so theretofore made. The court there remarked that by the decree of divorce and property settlement the parties became strangers to each other, neither thereafter owing to the other either legal or moral obligations or duties, and that there was therefore a complete change in their relations, within the rule of implied revocation of wills. The Nebraska case holds to the contrary; but the decision is apparently upon the theory of a strict application of the rule, and the fact of the property settlement appears not to have been deemed of much consequence.

Careful reflection and consideration of the subject leads us to the rule of the Michigan court. It appears to us more in accord with the reason and basis of the law, in harmony with the elementary rule of right and wrong, conflicts with no equitable or substantial right of the woman in such case, and is opposed only by a strict adherence to some of the older views on the subject, based, however, upon the commendable purpose of sustaining the directions of a person respecting the disposition of his property, left in the form of a solemnly executed will, who by reason of his death is no longer able to speak for himself or give further orders or directions in that behalf.

We recognize the importance of upholding the last wills of deceased persons, and we recognize the wisdom, also, of the rule of implied revocations by a change in the condition and circumstances of the testator. If the rule can have any proper or legitimate application in any case, it would seem to cover a case of this kind. Here the testator brought suit against his wife, charging her with adultery. He was then an old man, 70 years of age, and with a view to a severance of all relations with his wife he entered into an agreement by which she was to procure a divorce without contest by him, upon the consummation of which he made over to her in property and money practically what she would have received under the previously executed will, had he then died, and precisely what she would have received under the statute had he died intestate. He in effect withdrew his charge of infidelity and voluntarily settled upon her all she could or would have received under the will. He died within 30 days thereafter, without having changed his will, and the wife now comes into court asking for another third of his property, leaving the remainder, or one-third, to his children by his first wife.

If this is not a change of his condition and circumstances, within the meaning of the law, then the rule of implied revocation upon that ground is really without much substance or merit. His obligations to his wife, legal, moral, or otherwise, wholly ceased at the time of the divorce and settlement. By the settlement he fully discharged all legal duties, and the inference that he intended the allowance in full of all future rights ought in justice and good conscience to be the legal conclusion. We so hold. Whether the fact that the testator in such a case permits his will to remain unchanged by express revocation for a number of years after the divorce and settlement would militate against the conclusion of implied revocation we need not determine. Testator in this case died within 30 days after the settlement, and his failure expressly to revoke within that time certainly creates no inference that he intended his will to continue in force.

The case of In re Brown's Estate, 139 Iowa, 219, 117 N. W. 260, wherein the Iowa Supreme Court held that a decree of divorce, with an award of alimony to the wife, was not an implied revocation of the will of the husband, is not in point. The court distinguishes that from the Michigan case on the ground that the property settlement was not the voluntary act of the husband, and therefore no legitimate basis for an inference of an intention on his part to revoke his former will.

Order affirmed.[42]

[42] See, also, Wirth v. Wirth, 149 Mich. 687, 113 N. W. 306 (1907). Compare the case where a gift by will "to my said wife Emily" was construed as a gift to her in the character of wife, and as she had a previous husband living and undivorced the gift to her was deemed ineffective. Collard v. Collard (N. J. Prerog.) 67 Atl. 190 (1907). See, also, In re Boddington, Boddington v. Clairat, 25 Ch. D. 685 (1884). On the effect of divorce to revoke a gift by will, see 69 L. R. A. 940, note.

SECTION 5.—PRESUMPTION AS TO REVOCATION

McELROY et al. v. PHINK.

(Supreme Court of Texas, 1903. 97 Tex. 147, 76 S. W. 753.)

GAINES, C. J.[43] * * * The will was not produced but there was sufficient evidence introduced by the proponent of the will to establish its execution and contents, and that it could not be found. * * *

The authorities are practically in accord upon the proposition that where a will which, when last seen, was in the custody of the testator, cannot be found after his death, a presumption arises that it has been revoked. The proposition is evidently based upon the theory that it is a reasonable inference from the facts that the custodian, who in such case is the testator, has destroyed it for the purpose of revoking it. On the other hand, there is authority for holding that when at last accounts the will was in the hands of some one other than the testator—and especially in the possession of one to whose interest its provisions are adverse—the presumption of its destruction by the testator does not arise from the mere fact that it cannot be produced.

It may be that, if the will is shown to have been destroyed, it would not be presumed that it was the act of some one other than the testator, for the reason, as given by the English courts, that it would not be presumed that the custodian had committed a crime. But in this case the testimony traces the will, when last seen, into the possession of the husband of the testatrix; and it also appears therefrom that by the instrument all her property was devised to the proponent, and that the husband was an heir to her estate. It does not show that the will was destroyed. It is merely shown that it could not be found. It may be that it has been lost.

While it may not be permissible to infer that the husband had destroyed it, there is room for the presumption that he may have lost it. It is no offense against the law to lose an instrument in writing, and therefore it is not necessary to determine in the case whether to destroy the will of another, without authority to do so, is, under our law, where all penal offenses are defined by statute, a criminal act, or not. Therefore we think that under the evidence adduced in this case, according to the rule generally recognized by the courts, the trial judge was at least authorized to find, as he did find, that the will had not been revoked. * * *

For the errors pointed out [in the exclusion of evidence], the judgment is reversed, and the cause remanded.[44]

[43] Part only of the opinion is given.

[44] See Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431 (1903); Gavitt v. Moulton, 119 Wis. 35, 93

SECTION 6.—DEPENDENT RELATIVE REVOCATION

ONIONS v. TYRER.

(High Court of Chancery, 1717. 2 Vern. 742.)

Mr. Tyrer, in 1707, made a will, duly attested by three subscribing witnesses, and thereby had disposed of his real estate, and being afterwards minded to make some alteration in his will, in the year 1711 he made a second will touching his real estate, and with a clause in it of revoking all former wills; but there being no table in the room where the testator lay sick and subscribed his will, the three subscribing witnesses did not attest it in his presence, but went into a lower room out of the testator's sight, and there wrote their names as witnesses to the publishing this latter will; and it was also in proof in the cause that there being two parts of his former will, one whereof was in his custody, he called for that which was in his own custody, and directed his wife to cancel it, and the witness swore she heard her tear it; and the question now was, whether the former will was well revoked, or not.

First. It was resolved, that although there was an express clause in the latter will of revoking all former wills; yet that latter will being void, the witnesses not attesting the same in the testator's presence, that would not amount to a revocation, it being intended to operate as a will, and not otherwise as an instrument of revocation; and so it was adjudged in the case of Eggleston and Speak, 3 Mod. 258, 1 Shower, 89, and in the case of Hilton and King, 3 Lev. 86.

Secondly, where there were duplicates, and two parts of the former will, in case the testator duly cancelled and tore that part, which was in his own custody or keeping, that would be an effectual cancelling of the will, although the other part or duplicate remained whole and uncancelled; and it was so resolved in Sir Edward Seymour's Case.[45]

Thirdly. Lord Chancellor [Lord Cowper] was of opinion, that the former will stood good; for the latter will being void, and not operating as a will, would not amount to a revocation; and as to the actual cancelling of the former will, the evidence was not full and positive, that it was done; the witness thought she heard the wife tear it.

N. W. 395 (1903); Allen v. Morrison, [1900] App. Cas. 604; In re Miller's Will, 49 Or. 452, 90 Pac. 1002, 124 Am. St. Rep. 1051 (1907). See, also, 11 Prob. Rep. Ann. 319, note.

For a general discussion of lost or destroyed wills, including proceedings for their probate, see 110 Am. St. Rep. 445, note; 38 L. R. A. 433, note. On the admissibility of declarations of the testator upon the issue of the revocation of a will which cannot be found, see 14 Am. & Eng. Ann. Cas. 284, note.

[45] But the destruction of one copy when the testator understands that the duplicate is left in force is not a revocation. Managle v. Parker, 75 N. H. 139, 71 Atl. 637 (1908).

It is plain he did it only upon a supposition that he had made a latter will at the same time, and both wills as to the main, were much to the same effect, and with little variation as to the disposition of the real estate; and he did not cancel it with a design to revoke the devises as to the real estate, but intended to do the same thing by a latter will; and in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity, under the head of accident, and decreed it accordingly.[46]

JAMES v. SHRIMPTON.

(High Court of Justice, Probate Division, 1876. 1 P. D. 431.)

See post, p. 382, for a report of the case.

CAMPBELL v. FRENCH.

(High Court of Chancery, 1797. 3 Ves. Jr. 321.)

The will of the testator, dated London, 23d of August, 1790, and disposing of personal estate only, contained the following clause:

"As I understand that my late sister Margaret Bell has two grandchildren living in Northumberland county, Virginia, within three miles of North Cherry Point Church, whose names are Price Campbell, a grandson, and Pinkston Campbell, a granddaughter, I give to each of them £500."

A codicil, dated the 5th of January, 1791, contained the following clause:

"And as to the legacies or bequests given or bequeathed by my will to my sister, Margaret Bell's grandchildren, I hereby revoke such legacies and bequests; they being all dead."

The fact of the death of the legatees was not true. Pinkston Campbell married William Atkins in America. The bill was filed for an account and payment of these legacies.

Evidence proving the identity of the plaintiffs was read.

LORD CHANCELLOR [Lord LOUGHBOROUGH].[47] * * * It appears to me there is no revocation; the cause being false; whether by misinformation or mistake is perfectly indifferent. * * * Declare the legacies are not revoked, the parties being alive. * * *

[46] The destruction by the testator of a will which he thinks has been superseded by a new invalid will is held to be no revocation of the destroyed will. In re Estate of Irvin, 25 L. T. R. 41 (1908); Dancer v. Crabb, L. R. 3 P. & D. 98 (1873); Wilbourn v. Shell, 59 Miss. 205, 42 Am. Rep. 363 (1881). See, also, Giles v. Warren, ante, p. 245, and James v. Shrimpton, post, p. 382. On revocation by mistake, see 48 Am. St. Rep. 198, 202, note; 6 L. R. A. (N. S.) 1107, note; 1 Am. & Eng. Ann. Cas. 609, note.

[47] Part only of the opinion is given.

VARNON v. VARNON.

(Kansas City Court of Appeals, Missouri, 1896. 67 Mo. App. 534.)

ELLISON, J.[48] This action was brought to contest the validity of the will of plaintiff's deceased husband. The circuit court sustained the will as to all but what was designated as the fifth page. The widow appeals.

The will was written on seven pages of paper. We discover no reason to question the trial court's action in finding the testator was of sound mind, and that when he made the will he possessed full testamentary capacity. We have only to determine a question of law which arises on the established facts. The material portions of the will disposed of the property to the widow and only son, in equal parts; and in case of the death of either all was to go to the survivor. And that if both died without children, then the brother and sister of testator were to take the property.

That portion of the will which provided that if the son should die before his mother she should take the whole property, and that portion which provided that in case both mother and son died without children the brother and sister of the testator should take the property was written on the fifth page—composed the whole of the fifth page.

It appears that the testator's brother wrote the will and that the next day after it was duly executed, plaintiff became dissatisfied and made known her objections to the testator. Her objection was to the provision relating to testator's sister. She insisted that the sister was not entitled to any interest, however remote, in the estate. The testator seems to have concluded her objections were well founded, and he directed his brother, who had written the will, to tear out the fifth page, rewrite it as it was except to omit the name of the sister, thus having the effect to cut off the sister and leave the brother as the sole legatee if the mother and son died without children. The brother did as directed; so that the will, as it stood when probated, included the substituted fifth page. It was this fifth page the court rejected and established the remainder. Was this the proper disposition of the case? The statute of this state in relation to revocation of wills, is as follows:

"Sec. 8871. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, except by subsequent will, in writing, or by burning, canceling, tearing, or obliterating the same, by the testator, or in his presence, and by his consent and direction."

This statute means that there may be a partial revocation of a will, the balance remaining intact. This is announced as the law in juris-

[48] Part only of the opinion is given.

dictions governed by similar statutes. Bigelow v. Gillott, 123 Mass. 103, 25 Am. Rep. 32; Schouler on Wills, §§ 389, 397. And there is no reason why this may not be accomplished by tearing out a page, or other portion which it is intended to revoke. Schouler on Wills, § 430.

But when a revocation is made with a view to an immediate, other, and different disposition, the revocation becomes dependent upon the efficacy of that other disposition. Schouler on Wills, § 398; 1 Jarman on Wills, *135; Wolf v. Bollinger, 62 Ill. 368; Youse v. Forman, 5 Bush (Ky.) 345; Stover v. Kendall, 1 Cold. (Tenn.) 557; Earl of Ilchester, Ex parte, 7 Ves. Jr. 348.

In the case at bar the substituted page was noneffective, since the will, as changed, was not re-executed or witnessed in any way known to the law. And it is quite apparent to us that the testator only intended the revocation of the fifth page, to be accomplished by a substitution of another page with identical provisions except to omit the name of his sister. The face of the will itself demonstrates this. At the bottom of page 4 was the provision that in case of the wife's death all the property should go to the son, and at the top of page 5 was the provision that in case of the son's death all should go to the wife. Although this latter provision was on page 5, the testator had no design or intent to omit it from the will. He only intended, as just stated, to omit the name of his sister, so that she might not, in the contingency of the wife and son dying without children, become a beneficiary of the estate. In other words, he only intended to revoke page 5 by the immediate substitution of another page with the change indicated.

His intention to revoke depended upon, and was intended to be made by, the substituted paper. If that was noneffective, then no revocation was had. The result is that page 5 as first written is unrevoked and remains a part of the will. The fact that the page has been destroyed does not prevent its contents from being established by competent evidence. Jackson v. Jackson, 4 Mo. 211; Dickey v. Malechi, 6 Mo. 183, 34 Am. Dec. 130; Schouler on Wills, § 385. * * *

We will, therefore, reverse the judgment and remand the cause, with directions that the trial court enter judgment establishing the will as written before the attempted alteration. All concur.[49]

ATTORNEY GENERAL v. LLOYD

(High Court of Chancery, 1747. 1 Ves. Sr. 32.)

John Millington, seised of a considerable real and personal estate, made a will in 1734, and gave his real and personal estate to be laid out in purchase of real estate, to his executors and other trustees and

[49] Compare Rees v. Rees, L. R. 3 P. & D. 84 (1873).

their heirs, to apply the rents and profits to payment of some legacies; then to reimburse themselves, and then to a charity. He afterwards made a codicil in 1736, taking notice that he had given his real and personal estate to certain uses; and that being doubtful, whether by the late Mortmain Act his devise of his real estate to the charity or part thereof would be good, and being desirous to confirm it in that case, and not otherwise, he gives so much of his real and personal estate, as could not pass by his will, to the use of his nephew, Millington Buckley, at his age of twenty-one, with limitations over, on his dying without issue, with proper maintenance till that age. He afterward makes another codicil, reciting the former and the will, and that being advised, that his devise to the charity was void as to the real estate, though not as to the personal, and being desirous to continue it, and to make farther provision for better support thereof, he gave his personal estate to his executors upon trust, that if it cannot be laid out in land, it may in securities for the same charity; and his real estate he gives unto and for the use of Millington Buckley, at twenty-one; and declares, that it is his opinion, that his estate at L. is sufficient to maintain him during his minority. Upon an information to have the will and codicils so established, as that the charity might be carried into execution, it was decreed at the Rolls that the will was well proved, and that the trusts should be performed, and that a scheme should be proposed for carrying the charity into execution: from which decree the defendant, Millington Buckley, brought the present appeal.

Lord Chancellor [Lord Hardwicke]. I am very doubtful about this case, and would put it in a proper way of being determined. This is very different from all the cases cited. The question of revocation does not turn upon collateral circumstances, but merely on the words in the instruments themselves; which make it differ from Onions v. Tyrer; indeed, Lord Cowper there says, it might be relieved on the head of accident; but I do not know how he could come at it in a question between devisee and heir at law. It is proper, therefore, for a court of law; and the same construction must be made as there.

The first reason why I doubt, is, that if the testator had intended, as the relators contend, that this was a revocation, and a new devise only in case the will was not good, he would have left it on the first codicil; and no occasion for making a new one, for it would be just the same with respect to the charity as on the first.

Another reason, which makes me doubt, is that it is very nice to say that, because the reason a person gives fails, therefore his devise should fail. I do not know how far that will extend; the testator has put it on the advice he received, which was a fact of his own knowledge; and he has grounded it on that advice, and not on the reality of the law. He might do it in order to quiet the doubtful question; but I do not say he did so.

The third and principal reason is, I doubt, whether this disposition is put singly on the point of law; for considering the material words "being advised," and the subsequent words, who can tell what he meant there? The codicil was made two years after, and his personal estate might be so increased as to be a sufficient fund for the charity; for all this together might be his reason, and it is impossible to say he depended on one more than another.

I give no opinion, for it is a mere point of law, and a new case; and will send it into B. R., to be there solemnly argued, and reserve further considerations till after the judge's certificate.[50]

TUPPER v. TUPPER.

(High Court of Chancery, 1855. 1 K. & J. 665.)

William George Tupper made his will in 1851 and it contained among other things the following provision: "In acknowledgment to Almighty God that all I have is His already, and that I am but His steward, I hereby offer to Him the sum of £850, being about one tenth of my property; which sum of £850 I desire may be raised by my

[50] The question was, "Whether the testator's real estate in S. and S. were well devised by the second codicil, dated the 17th of March, 1736, to the defendant M. B. for life, with remainder over to his first and other sons in tail male, the said M. B. having attained his age of 21 years," etc. The court certified in the affirmative, whereupon Lord Hardwicke declared and decreed accordingly.—REP.

In Thomas v. Howell, L. R. 18 Eq. Cas. 198, 211–212 (1874), Sir R. Malins, V. C., said: "With regard to Attorney General v. Lloyd, it was a very peculiar case, and I am of opinion that, if the question had turned on the construction of the first codicil, the decision would have been the other way. It is perfectly clear that, the reason on which the gift was made having failed, the conditional gift would not be good. Then came the second codicil, by which the testator made an absolute gift of the realty to one person, and an absolute gift of the personalty to the charity to which he had previously given the whole, stating as a reason for the alteration in disposition, his having been advised that a gift of the realty would have been void under the Statute of Mortmain. This was a mistake, because the will was made before the act of 9 Geo. II, but the codicil was upheld. That does not reach this case, because here there is no complete alternative gift. I think, however, that if Attorney General v. Lloyd had to be decided now, the decision would be the other way." But in Skipwith v. Cabell, 19 Grat. (Va.) 758 (1870), Joynes, J., said: "It is as if she had said, 'I have been advised that these legacies will be liable to confiscation, and, to avoid all risk, I revoke them.' She chose to make the revocation because she had been so advised, but she does not put it on the soundness of the advice, and the revocation cannot be set aside by showing that the advice was unsound. 1 Powell on Devises, 527; Atty. Gen. v. Lloyd, 3 Atk. 551." So in Newton v. Newton, 12 Ir. Ch. 118 (1861), Lord Chancellor Brady said: "It appears to me that there is a plain distinction between the recital of a fact, which turns out to be erroneous, and the recital of advice or opinion, which the testator acts upon." Where the codicil revokes the will, giving a reason which the testator must know to be untrue, the revocation may nevertheless be effective. Mendinhall's Appeal, 124 Pa. 387, 16 Atl. 881, 10 Am. St. Rep. 590 (1889). See, also, Hayes' Ex'r v. Hayes, 21 N. J. Eq. 265 (1871).

executors hereinafter named out of my pure personal estate, and such as I am by law entitled to dispose of and appropriate, and paid by them in manner following (that is to say): To the treasurer for the time being of the Missionary College of Saint Augustine, at Canterbury, the sum of £300; to the treasurer for the time being of the Society for Promoting the Employment of Additional Curates in Populous Places, the sum of £300; and to the treasurer for the time being of the Tithe Redemption Trust, the sum of £250." And after giving some pecuniary legacies, the testator gave all the residue of his property, and appointed executors.

By a codicil, dated in 1853, he made the following gift: "Whereas I have in and by my said will desired my executors therein named to pay the following legacies, namely: To the treasurer for the time being of the Missionary College of Saint Augustine, at Canterbury, the sum of £300; to the treasurer for the time being of the Society for Promoting the Employment of Additional Curates in Populous Places the sum of £300; and to the treasurer for the time being of the Tithe Redemption Trust, the sum of £250; now I do hereby revoke the beforementioned legacies, and in lieu thereof I give and bequeath to the treasurer for the time being of the House of Charity in Rose Street, Soho, aforesaid, the sum of £1,000, for the extension fund of the said House of Charity; which I direct may be raised by the executors in my said will named out of my pure personal estate, and such as I am by law entitled to dispose of and appropriate."

The extension fund of the said House of Charity was a fund which was being raised for the purpose of providing a freehold site and a suitable building for the purposes of the said institution, instead of the house now occupied, and the gift to the treasurer of the House of Charity was void.[51]

Vice Chancellor Sir W. Page Wood. There is some difficulty in this case, because, although the difference may not be very striking, it is not precisely the case of a gift to an object incompetent to take; but I think that it falls within the principle of the case in which there was a devise to a parish; and that to make a distinction between them would be carrying the refinements, which have gone very far already, farther than would be advisable. I concede that it is very difficult to make a satisfactory distinction between Onions v. Tyrer, 1 P. Wms. 343, and those cases in which the gift fails for want of capacity in the devisee to take. There is this difference, that, in cases like Onions v. Tyrer, the testator is making an instrument, which he intends to be effective as a whole, and the law takes away one half, in the same manner as though it cut off the operative half of the instrument, leaving only the revoking part of the will; and it may be said, that it was the intention of the testator that the instrument should operate in an entire and not in a mutilated form; while in the other cases, where the

[51] The statement of the case is abbreviated.

testator has made certain gifts, which are invalid in law, the instrument is in a sense operative, but the party to take under it is not allowed to receive the benefit.

It has been argued, that the law does not render the treasurer of a charity absolutely incapable of taking, but only makes void the gift to him in trust for the purposes of this charity; and, therefore, that this part of the will is blotted out; and that makes the case still more like Onions v. Tyrer. I think, however, that though something is to be said for it, that is too fine a distinction to make any real difference between this case and that in which there was a gift to a parish. Although the law would prevent that from taking effect either by deed or will, yet being by will, in which the testator manifested an intention to revoke a previous gift, it was held that the revocation must take effect, although the gift was void. French's Case, Roll. Abr. "Devise," O, 4.

In this case the gift is to a charity, and regarding the solemn introduction to his will, it is probable that the testator did not intend to withdraw from pious uses the sum which he had set apart for them; but that does not indicate an intention that the legatees whose legacies he revokes should remain recipients of his bounty. He expressly says by the codicil, that they shall not receive anything, but that the fund shall be given to another object; and though this latter cannot take it, I cannot speculate on whom he might wish to confer the benefit in such an event. He desired to devote the money to charity generally. The law prevents the particular object which he has designated from taking anything, and I must hold that the revocation remains in force, though the gift by the codicil may be void.[52]

[52] See Quinn v. Butler, L. R. 6 Eq. 225 (1868); Vining v. Hall, 40 Miss. 83 (1866); Price v. Maxwell, 28 Pa. 23 (1857); Dudley v. Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959 (1900); Board of Com'rs of Rice County v. Scott, 88 Minn. 386, 93 N. W. 109 (1903). In Laughton v. Atkins, 1 Pick. (Mass.) 535, 545, 546 (1823), Parker, C. J., said: "A will perfect in its nature is made and properly executed, but is incapable of operating on account of some incapacity in the devisee to take. This nevertheless operates as a revocation of a former will, because all the requisites of the statute are complied with, and it is inoperative only on account of some extrinsic circumstance." In Quinn v. Butler, supra, Lord Romilly, M. R., said: "I entirely assent to the observation of Lord Justice Page Wood in Tupper v. Tupper, 1 K. & J. 665, where he remarks that the testator expressly says by the codicil that the legatees shall not receive anything, but that the fund shall be given to another object, and that although this latter person cannot take the gift, the court cannot speculate on whom the testator might have wished to confer the benefit in such an event."

But see Security Co. v. Snow, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107 (1898), where the testator by codicil revoked a gift in his will to his daughter Alice and in lieu thereof gave her share to his wife in trust to invest and manage and pay over to the daughter as the wife should deem proper and on the daughter's death to pay over any portion left to the daughter's lawful heirs. The gift in remainder to the lawful heirs was void under the state statute against perpetuities, and testator's wife died before making over any considerable portion of the estate to the daughter, and it was held that upon the death of the wife the original gift to the daughter was restored in full force. Baldwin, J., for the court said (70 Conn. 293, 294, 39

In re GOODS OF MORESBY.

(Prerogative Court of Canterbury, 1828. 1 Hagg. Ecc. 378.)

This was an application from the widow of Lieutenant Moresby, R. N., that probate of his will, dated on the 25th of January, 1821, might be granted to her as sole executrix; and in support of her application she made the following affidavit:

"That she was the relict of the deceased, sole executrix, and universal legatee for life named in his will, duly executed and dated the 26th of January, 1821; that shortly after this period the deceased left England, in the command of a private merchant vessel, taking with him this will, and proceeded with his wife to Peru; that after their arrival, they resided principally on board, but that during a temporary absence of Lieutenant Moresby, the vessel with all his effects and papers, including his will, was captured by pirates, but was soon afterwards retaken; that on the occasion of such capture, the deceased lost several papers of consequence, and expressed his firm belief to his wife that his will had then been destroyed; that the deceased, as she has been informed, and verily believes, whilst at the city of Bolivar, was attacked with the illness of which he died; that on the 13th day of February, 1827, the day before his death, being incapable of writing, and fearing he might die intestate, he sent for a notary, in whose presence, and that of four other witnesses, he made a nuncupative will by declaring, that in contemplation of his death, he nominated and appointed two executors—both resident in the city of Bolivar—and his wife sole heiress, and revoked all his other testamentary dispositions; but that the said will was not reduced into writing in the lifetime of the deceased."

Mrs. Moresby further made oath, "that, upon the renunciation of the two executors in the proper court at Lima, she there duly proved the nuncupative will, and administered the effects in Peru; and that shortly before the deceased's death, and, as she verily believes, while he was at Bolivar in his last illness, she discovered among his papers on board, the will, dated 26th January, 1821, but that he died in ignorance of that circumstance." The affidavit further stated, that both the executors were resident in the city of Bolivar, or some other part of Peru, of which one was a native.

Atl. 155, 66 Am. St. Rep. 107): "The revocation of his former provision for Mrs. Burrill [the daughter] was indissolubly coupled with the creation of the substituted provision. It may be given effect, so far as the substitution is valid, but no farther, because so only can the plain purpose of the testator be attained, and the mutual dependence of the two articles of the codicil preserved. The whole instrument was a single testamentary act, and must be read as if the testator had expressly declared that he revoked the gift made to Alice in his will simply to put it in a different form. The rule of construction upon which we proceed is analogous to that governing a revocation which is grounded on a state of facts which proves not to exist. It falls when its foundation falls."

The only property of the deceased in this country consisted of about £500 due for arrears of half pay.

Lushington. The question is, whether a nuncupative will made and proved in Peru supersedes a prior will written and executed in this country—whether the Statute of Frauds (29 Car. II, c. 3, § 22) does or does not affect such a case. The widow, in asking probate of the will of 1821, waives an interest which she would take under the will of 1827—in the former, she has but a life interest—in the latter, she is absolute universal legatee.

PER CURIAM. It is not necessary here to decide the question (upon which there may be some doubt), whether the Statute of Frauds would apply to the nuncupative will made in Peru. Both wills contain nearly the same disposition, and give the whole property to the wife; the latter absolutely; the former, of which she is content to take probate, for life only. It appears that the deceased did not intend to revoke the will of 1821, but supposing it to be lost, and being unwilling to die intestate, he made the nuncupative will. As, however, the former has been recovered, there is no objection to probate thereof being granted to the widow and universal legatee for life.

Motion granted.[53]

POWELL v. POWELL.

(Court of Probate, 1866. L. R. 1 P. & D. 209.)

Sir J. P. WILDE.[54] The testator in this case made a will on the 3d of March, 1862, and a second will, revoking the first, on the 29th of March, 1864. In 1865 he destroyed the will of 1864, and the question is, whether, by that act of destruction, the will of 1864 has been legally revoked, seeing that his object in the act of destruction was to set up the will of 1862. It is not contended that effect could be given by law to this object, but failing that, it is argued that effect ought not to be given to the destruction of the will of 1864 as an act of revocation. I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done animo revocandi, it is no revocation.

[53] See note to Brook v. Warde, ante, pp. 229, 230.

[54] The statement of facts is omitted.

What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the animus revocandi had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument.

But then it is said, that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, "I tear this will of 1860 because I have this day (1st of January, 1861) executed another designed to replace it"; or, "I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my old will of 1840?" In either case the revocatory act is based on a condition, which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the animus revocandi present.

It is only necessary to add that, in the above observations, it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. And such was, I think, upon the evidence given in this case, the reasonable conclusion of fact. Cases may, and probably will, arise in which the intention is either mixed or ambiguous, and such are for future consideration.

The only case cited that requires special mention is that of Dickinson v. Swatman, 30 L. J. (P. M. & A.) 84. But Sir C. Cresswell, in that case, does not appear to have been satisfied that the sole intention in destroying was to set up the previous will. He is reported to have said: "At all events, to make it a case of dependent relative revocation, you would have to show that he did not intend to revoke the second will unless by doing so the first would have been revived."

The court pronounces, therefore, for the will of the 29th of March, 1864, as contained in the draft thereof produced and sworn to by Mr. Newman, the attorney who made it.

The costs of all parties out of estate.

In re EMERNECKER'S ESTATE.

Appeal of AARON.

(Supreme Court of Pennsylvania, 1907. 218 Pa. 369, 67 Atl. 701.)

Penrose, J., of the court below, made the following statement of the facts herein:

"The petition for appeal avers that the decedent died May 13, 1905; that on July 16, 1903, she executed a will giving all her estate, real and personal, to her granddaughter, the petitioner, who, from the time she was 13 years old, had lived with and given to her her wages and had aided in supporting her; that the decedent had often declared her intention to leave the whole of her estate to the petitioner, because the money of the latter had gone into it; that the decedent was a 'person of little education and very susceptible to the influence of her friends and neighbors and those with whom she constantly associated, and was so anxious to have her estate go to the petitioner that she constantly discussed her will,' after it had been so executed, with them. * * *

"When the will was drawn, the testatrix, an elderly German woman, was under the impression that the provision in favor of her granddaughter, to the exclusion of her children and other grandchildren, would be invalid unless she gave a nominal amount, at least, to each of those so excluded; but upon the assurance of Mr. Braun, by whom it was drawn, that this was unnecessary, she executed it in the presence of two witnesses. Notwithstanding this she appears to have been uneasy on the subject, and in April, 1905, about three weeks before her death, she had a conversation with Mrs. Scheidt, an old friend, who told her that the will was not good because of the omission of gifts to her children of at least $1. A week or ten days later, in a conversation with another friend, Mrs. Bolst, she spoke of her will with reference to what Mrs. Scheidt had said to her on the subject, and declared that she would 'make another will so that nobody will be able to take anything from the property what she knows she wished to will to Ellie.' She then, in the presence of Mrs. Bolst, tore the will up and threw the pieces into the fire, saying to her that 'on the first fine day' they (the decedent and Mrs. Bolst, who also wanted to have her own will drawn) would go to 'Ladner, to Eighth and Green,' to have him 'draw a new will,' in which she would give to each of her children $1, 'and for Ellie everything she had in her possession, because she was working for her.' At this time the decedent appeared to be in perfect health, but when, about a week later, on Friday morning, Mrs. Bolst called to go with her to Mr. Ladner's, she found that she had been taken sick the previous night. She died the next day."

PER CURIAM.[55] This case affords an illustration that may almost be

[55] Part of the statement of facts is omitted.

called pathetic of the persistency of popular error. The notion that to disinherit the heir he must be "cut off with a shilling" (for the probable origin of which see Newlin's Estate, 209 Pa. 456, 58 Atl. 846, 68 L. R. A. 464), started more than 300 years ago, never was the law either in England or Pennsylvania, and yet survives with such potency as to lead to results apparently as unjust as they were unintended.[56] The undisputed facts of this case do not admit of any question as to the legal result, however much we may be impressed that the testatrix's act was induced by an erroneous belief as to the law. She intentionally destroyed the will, and declared she had done so with intent to make another. She knew what she was doing, and the effect of it, and she did it animo revocandi, with intent to produce that effect. Her reasons were not matter of inquiry for the court. Whether, if she had felt sure that the will already executed would accomplish what she wanted to do, she would have changed it, we may speculate, but we do not know.

As was well said by the learned judge below: "She was aware that, until this new will was executed, she was without any will at all, and the time of execution was left indefinite. Her friend was to call the 'first fine day' to go with her to have it drawn. This was merely the expression of an unwritten intention to do something in the future, and, no matter how fully her mind was then made up, there might be a change of intention at any time before it was permanently expressed in writing; and whether the intended provision for her children would

[56] Newlin's Estate, supra, finds the explanation in the Pennsylvania statute which provides that where a person who has made a will afterwards marries and has a child or children not provided for in the will, and dies leaving a widow or child, or both, he shall be deemed, as regards such widow or after-born child or children, to have died intestate, and they shall take accordingly. The court points out that "the basis of the rule as to revocation of wills by the subsequent marriage and birth of children to the testator is the latter's implied intention as to his disposition of his property under such change of circumstances. * * * The statute is founded on the same presumption that the unborn child was not in contemplation of the testator when he made his will, and that, if he had been, he would have changed the provisions. It gave the unborn child no greater rights in the parent's estate than the living children, but it did raise in his favor a legal presumption that required a definite provision to overcome. It is like the Roman law from which the principle was borrowed that, if a child was passed over without mention, it was presumed that he had been omitted by accident, but if he had any legacy, however small, it was held to show that the omission was intentional, and no querela inofficiosi testamenti was allowed. 'Hence probably,' says Blackstone, 'has arisen that groundless vulgar error of the necessity of leaving the heir a shilling in order to disinherit him effectually.' 2 Com. 503. The statute * * * makes no requirement that the child shall be fully or equally provided for. * * * All that it does require is that he shall have the child in mind and shall make clear his intention that the will shall apply to it." 209 Pa. 464–465, 58 Atl. 849, 68 L. R. A. 464. Under similar statutes in a number of states children unintentionally not provided for by will, whether after-born children or others, take as if the testator had died intestate. See cases and notes in part II, chapter II, § 2, post, on "Pretermitted Heirs." No set sum seems to be required to disinherit a child under any of those statutes.

be substantial or merely nominal cannot be known. A will giving even a dollar to each child would be a different will from the one destroyed, and the dollar so given could be demanded by the legatees."

It seems to be a hard case, but there is no remedy, without making the bad law which such cases are said to invite. Decree affirmed.[57]

DIXON v. SOLICITOR TO THE TREASURY.

(High Court of Justice, Probate Division. [1905] P. 42.)

Probate Action. The plaintiff, as sole executor, propounded a will dated July 7, 1894, of James Alexander Shaw, who died on February 8, 1904.

The deceased had no known relatives, and the Crown, as interested in the event of an intestacy, was made defendant in the action, and pleaded that the deceased mutilated his said will by cutting off therefrom, with a pair of scissors, his signature, and by erasing parts of the document with the intention of revoking the same; that the will was thereby revoked; and that the deceased died intestate.

The plaintiff, in reply, denied that the acts alleged in the statement of defense were done (if at all) with the intention to revoke the will; and, further, that the acts of revocation (if any) were accompanied with an intention, on the part of the deceased, to execute a new will, and were conditional on such new will being executed.

It appeared from the evidence adduced at the trial, which was held before Gorell Barnes, J., and a special jury, that the deceased a few days before his death gave instructions to a solicitor for a new will, and, after sending for the will of 1894, there and then cut off his sig-

[57] "It is said, and indeed it would seem from the testimony, that Ignatius Semmes did not intend to die intestate: but, however that may be, we cannot make a will for him. By the will, which is now attempted to be set up, he had disposed of the whole of his estate to his wife, in trust for the 'use and support of herself, and the benefit, education and support,' of his infant son until he should arrive at the age of twenty-one years, when he bequeathed one-half of his personal property absolutely to his wife; but, she dying, he struck out his own signature and the names of the subscribing witnesses, and made a memorandum at the bottom of the will, assigning as a reason for what he had done that his wife's death had rendered it necessary to make another will. If that was not a revocation, it would be found difficult to revoke a will by canceling. In Burtenshaw v. Gilbert, 1 Cowp. 49, which was cited in argument, there were two wills, and after the death of the party, the second will, with a duplicate of the first, which he had kept himself, were found together among his papers both canceled; and it was proved that he had sent for an attorney to prepare another will, but lost his senses before it could be done. It was not doubted that the second will was revoked. The only question raised, was whether the revocation of the second will did not set up the uncanceled duplicate of the first, and it was determined that it did not. That case surely cannot be called in aid of this will." Buchanan, C. J., in Semmes v Semmes, 7 Har. & J. (Md.) 388, 391 (1826).

nature, and he stated, in answer to a remonstrance by the solicitor, that he meant to cancel the will as he was going to make a new one. The deceased further was alleged to have expressed himself to the effect that he understood that the cutting out of a signature from an old will was a necessary preliminary to making a new will. After he had thus mutilated the will, the deceased made a statement to the effect that his sole reason for desiring to make a new will was his desire to increase a certain legacy. The instructions then given to the solicitor covered, not merely the increase of that legacy, but other alterations. The solicitor used the mutilated document for embodying the deceased's instructions, and on the following day went through it with the deceased, who desired that a draft will should be prepared. This was accordingly done, but the deceased died without having executed it.

The instructions given by the deceased to the solicitor only covered a portion of the estate which the deceased had to dispose of.

Gorell Barnes, J., having decided to leave the question to the jury, summed up as follows: For the purposes of to-day I have decided to leave the question of fact to you. The plaintiff, being the executor, propounds this will of 1894 and proves its due execution. It was a perfectly good will down to the time when the question as to whether it was cancelled or not arose. It arises out of the events of the 6th, 7th, and 8th February, and upon that the Crown says the will was duly revoked by virtue of the 20th section of the Wills Act, 1837 (1 Vict. c. 26), which, so far as it applies to the present facts, is as follows: "* * * No will or codicil, or any part thereof, shall be revoked otherwise than * * * by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

The plaintiff, on the other hand, says that the destruction was not effected with the intention of revoking the will, but with the intention of getting rid of it and putting another will in its place. Looking at the will and at the instructions given on February 7th for a fresh will, I do not think it is correct to say that the testator's sole object was to deal with the legacy to one particular lady. It is obvious that the testator intended to make a new will, and did not intend that the Crown should take his property. He sent for his solicitor to take his instructions for a new will. The testator there and then cut out his own signature with a pair of scissors. It was just one of those stupid acts without which this court might almost cease to exist. There is no doubt that the testator did what he did because he was making a new will. There is a point in this case which seems to differentiate it from those reported cases in which the judges were in doubt. If this testator cut out his signature because he thought that he had to cut it out before he could start operations on the fresh will, then he was doing that act as part of the operation of bringing a new will into force; and, if this were so, it follows that he would

not have cut out his signature if he had thought that it would have the effect of making him die intestate. The questions I leave to you are:

(1) Whether the testator cut his signature off the will with the intention of revoking the will; or

(2) Whether the testator cut his signature off the will with the intention that the will should be revoked conditionally on his executing a fresh will.

The jury answered the first question in the negative, and the second question in the affirmative.

Robertson asked for judgment for the Crown on that finding. The principle as to destruction of a testamentary document under a mistaken impression of law or fact has never yet been applied in a case where the document intended to be substituted was nonexistent and had never existed as a valid testamentary document.

GORELL BARNES, J. I pronounce for the will. The costs must of course come out of the estate. The litigation has arisen through the testator's own fault.[58]

In re GOODS OF McCABE.

(Court of Probate, 1873. L. R. 3 P. & D. 94.)

Esther Jeremy McCabe, late of Ticehurst, Sussex, spinster, died on the 3d of March, 1873, having made a will dated the 27th of August, 1863, in which she appointed Robert Jeremy McCabe sole executor. The will was found by deceased's sister, Mrs. Laming, after the death of Miss McCabe, in a davenport in Mrs. Laming's house, the property of the deceased. It was in an envelope which had been sealed, but the seal had been broken. The will was entirely in the

[58] See Goods of Applebee, 1 Hagg. Ecc. 143 (1828); McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71 (1904). But see Banks v. Banks, 65 Mo. 432 (1877). In McIntyre v. McIntyre, supra, the court said: "The doctrine as we understand it, and are willing to apply it, is this: The mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation. If it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though cancelled, should be given effect, if its contents can be ascertained in any legal way. But if the old will is once revoked—if the act of revocation is completed—as if the will be totally destroyed by burning and the like [with the intent to revoke it at all events?] or if any other act is done which evidences an unmistakable [and unconditional?] intention to revoke, though the will be not totally destroyed, the fact that the testator intended to make a new will, or made one which cannot take effect, counts for nothing. In other words, evidence that the testator intended to make or did actually make a new will, which was inoperative, may throw light on the question of intention to revoke the old one, but it can never revive a will once completely revoked." 120 Ga. 70, 71, 47 S. E. 503, 102 Am. St. Rep. 71.

handwriting of the deceased, and contained the following clauses: "After payment of all the above legacies, I will and bequeath to my sister Caroline Jeremy Luro half of the sum of money remaining undisposed of, and to my *sister Louisa* Galsworthy the remaining half of the same sum. * * * To my *sister Louisa Jeremy Galsworthy* I leave, as a remembrance, the print hanging at present in my bedroom. And the whole of the remainder of my personal effects and property of whatsoever nature, excepting any sum of money which may remain after payment of all the above-mentioned legacies, I leave to my *nieces and nephews*." The words in italics were written on erasures, but the attesting witnesses could give no information or explanation whatever in reference to them.

Messrs. Chabot and Netherclift were of opinion that the words written under *sister Louisa*, in the first paragraph, were *niece Edith*. Mr. Galsworthy, in his affidavit, stated that at the date of the will, the 27th of August, 1863, his wife Louisa Galsworthy was seriously ill, a fact well known to the testatrix, and it was not expected either by her husband, by the testatrix, or any other member of the family, that she would recover; and that he had no doubt that by reason thereof the testatrix believed that any bequest of a share of her property to her sister would be inoperative, and she determined to give such share to Louisa Galsworthy's only child Edith, to whom testatrix was much attached. At the end of the year 1864 Louisa Galsworthy completely recovered from her illness, and the fact of such recovery was known to the testatrix, who visited her sister in 1865. In consequence of the recovery of her sister, the testatrix probably erased, or attempted to erase, the words *niece Edith* from the will, in order to substitute in the place thereof the name of her sister, and in consequence of the space being insufficient for the full name, left out the word Jeremy, which in other cases she had always used. Louisa Galsworthy died in October, 1866, and from that time the testatrix was incompetent to manage her affairs, or make a new will.

Dr. Tristram, for the executor, applied for probate.

Sir J. HANNEN. By the will of the testatrix, as found at her death, half the residue of her money was left to her sister Louisa Galsworthy; the words *sister Louisa* were written on an erasure, and as the attesting witnesses could give no explanation of the alteration, these words must be rejected. But it is alleged that the words erased were *niece Edith*. It is stated by Messrs. Chabot and Netherclift that they can, with the assistance of a magnifying-glass, read these words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, and I am unable to discover what these gentlemen say they see. If this were a case of simple obliteration, I should not be able to act upon the evidence of these experts, for the Statute of Wills gives no effect to obliterations, except so far as the original words shall not be apparent. And this has been decided to mean, "apparent on an inspection of the instru-

ment," not "apparent by extrinsic evidence": Townley v. Watson, 3 Curt. 761.

But as this is a case not merely of obliteration, but of substitution, I am at liberty to inquire whether the testatrix did not intend only to revoke the original bequest, on the supposition that she had effectually substituted another. This is established by the cases of Brooke v. Kent, 3 Moo. P. C. 334; In the Goods of Harris, 1 Sw. & Tr. 536; In the Goods of Parr, 29 L. J. (P. M. & A.) 70; 6 Jur. (N. S.) 56. In the last-named case Sir C. Cresswell expressed a doubt whether the doctrine of dependent relative revocation could be applied to cases where not merely an appointment of a fresh executor was attempted, but a new legatee was substituted; but the judgment of Sir W. Grant, in the case Ex parte Earl of Ilchester, 7 Ves. 372, shows that the doctrine is equally applicable where the later invalid will or bequest is in favor of a different person to the one named in the earlier. The designation of a fresh legatee is, no doubt, an important circumstance to be considered in determining the question of fact, whether the destruction or obliteration was intended to be dependent on the efficacy of the substituted disposition; but where that is clear, the nature or extent of the contemplated alterations are immaterial. This is well illustrated by the circumstances of the present case. If the words written on the first erasure be rejected, the bequest in the will will run thus: *"To my ——— Galsworthy."* This makes it clear that the bequest was to some connection of the deceased of the name of Galsworthy. Her only relatives of that name were her sister, her sister's husband, and her sister's daughter.

The facts stated in the affidavit of Mr. Galsworthy make it in the highest degree probable that the bequest was not originally made to the deceased's sister, because she was then dangerously ill and expected to die. In this state of things, it was natural that the bequest should be made to one of her family, as it is clear it was, but it cannot be supposed that the testatrix intended to revoke a bequest made under such circumstances absolutely, and without reference to her desire to substitute the name of her sister, who had been restored to health. I cannot have a doubt that she would not have obliterated the name of that member of her family of the name of Galsworthy, which originally stood in the will, if she had not believed that she could validly substitute the name of her sister; and if this be so, the doctrine of dependent relative revocation is applicable, and I am at liberty to have recourse to any means of legal proof to establish what the obliterated words were.

In this inquiry I accept the evidence of the experts to this extent, namely, that that which is visible of the remains of the letters which are obliterated is consistent with the theory that the words were *niece Edith,* and inconsistent with the theory that they were *brother-in-law,* or any other words which can be reasonably suggested to fill up the blank between *my* and *Galsworthy;* and taking this in combination

with the other evidence as a whole, I come to the conclusion that the words obliterated were "niece Edith," and I direct probate with those words restored. The other words written on erasures, not being accounted for, must be rejected.

In re GOODS OF HORSFORD.

(Court of Probate, 1874. L. R. 3 P. & D. 211.)

George Fahie Horsford, late a captain in Her Majesty's service, unattached, on the 1st of April, 1868, executed a will which was written on two sheets of foolscap paper. The writing covered five sides of the paper, terminating at the bottom of the fifth side, with a full attestation clause where the witnesses signed their names. At the top on the sixth side were the words, "To which will and testament I hereunto annex my seal and signature, dated this 1st day of April, in the year of our Lord 1868. Geo. F. Horsford, Captain Unattached." Pieces of paper were pasted over certain parts of the will with writing on them, as appears in the paragraphs following in italics:

"I leave the interest on £309. 9s. 6d. bank stock to my god-child, Rosina Horsford Wood; and in case of her death unmarried, or, if married, childless, then to my brother, Sir Robert Marsh Horsford, Knt., C. B., for his lifetime, and afterwards the interest to my cousin Amelia Thorpe, widow of Colonel Thorpe, formerly of the 89th Regiment; and after her death the principal of the said bank stock *to Mary Ffinch, the eldest daughter of John Ffinch of Greenwich, Esquire, deceased.* I also leave and bequeath to my adopted god-child, Rosina Horsford Wood, for her sole use during her lifetime, the interest of the sum of £174. 2s. 3d. reduced 3 per cent. annuities, and, if she marry and have children, the principal to them after her decease. In case she should die single, or, if married, childless, the interest of the said amount will revert to my brother, Sir Robert Marsh Horsford, Knt., C. B., and then to my cousin, Amelia Thorpe, &c., and after her death the principal *to Mary Graham, daughter of the Rev. Leonard Graham, who married Lavinia Horsford.*"

Sir Robert Marsh Horsford was appointed executor. On the 29th of July, 1874, the deceased executed a codicil to his will in the following manner. It was written on a sheet of foolscap paper, the writing covering the first and half the second sides of the sheet. Attached by a string, passing through the fold of the sheet about opposite to the termination of the writing, was a separate paper on which was written, "To which codicil I hereunto annex my seal and signature, dated this 29th day of July, 1874." This was followed by the signatures of the deceased and of the witnesses, Captain Hedley and Mrs. Bourne.

The contents of the codicil, so far as material, were as follows: "Febry., 1870. Codicil to the will of Captain George Fahie Horsford.

Should anything occur to prevent from death my will acting in any way I have stated, I leave and bequeath to Mrs. George Davies, formerly Rosina Horsford Wood, 82 Blake Street, Barrow-on-Furness, Lancashire, should she survive any children she may have, or in the event of her not having any, the whole of the money invested in my name in the different funds of the Bank of England, together with my bank stock, for her sole use. I leave and bequeath *ten* pounds, *which will be found* with my photograph, to Emily Bush, the youngest daughter of Lieut. Colonel J. T. Bush, late of the Honble. E. I. Service, Bengal Army, as a remembrance for kindly coming to see me when she was a little girl!" The words in italics were written on pieces of paper pasted over the original writing of the codicil. * * *

Nugent applied to the court to grant probate of the will and codicil.

Sir J. HANNEN.[59] * * * A further question arose as to certain obliterations which appear upon the will and codicil, and of which the attesting witnesses were unable to give any account. Strips of paper have been pasted over portions of the original will and codicil, and on some of these strips, words have been written by the testator, by which he has sought to make bequests to several legatees. It is clear that the words so written on the strips of paper must follow the fate of ordinary alterations, and in the absence of evidence showing when they were made, it must be presumed that they were so added after the execution of the will and codicil. But ought I to treat the words over which the pieces of paper are pasted as effectually obliterated, and grant probate of the will or codicil with the hidden passages in blank, or ought I to endeavor to ascertain what words have been covered up, and include them in the probate?

As to the will, the answer to these questions depends upon the construction to be put on the twenty-first section of the statute 1 Vict. c. 26, by which it is enacted that no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will. Soon after the passing of the act, Sir H. J. Fust, in Townley v. Watson, 3 Curt. 761, decided that the construction to be put upon the words of the twenty-first section was that the effect of the will before the alterations must be apparent on the face of the instrument itself. He said: "What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned: 'unless the words shall be capable of being made apparent'?" I think it is impossible

[59] The statement of facts is abbreviated, and part of the opinion is omitted.

to read the words of the statute, and not say that it was the intention of the Legislature that, if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the act of Parliament.

Mr. Justice Williams (Executors, page 139, 6th Ed., in a note) says: "In a case before Sir H. J. Fust, he ordered that the erasures in a will should be carefully examined in the registry with the help of glasses, by persons accustomed to writing, to ascertain whether the words could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. Generally speaking the Ecclesiastical Court will not in the first instance take upon itself to decide whether the words obliterated can or cannot be made out. It must be proved." But it has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by aid of glasses. Chemical agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think it would be proper to adopt such means. I think that the word "apparent" in the twenty-first section means apparent on the face of the instrument in the condition in which it was left by the testator, and that if he has had recourse to extraordinary means to obliterate what he had written, then this court is not bound to take any steps to undo what he had done.

The statute does not draw any distinction between different modes of obliteration. The effacement of the original writing as performed by this testator, by pasting paper over it, is complete, and I can see no reason why the court should remove the pasted paper used as the instrument of obliteration, rather than ink used for the same purpose. I shall therefore give no directions on the subject so far as the will is concerned; and, assuming that the words covered over cannot be ascertained by inspection the probate must go with those parts in blank.

But with regard to the obliterations in the codicil, the case is different. There the amount of a legacy has been obliterated, leaving the name of the legatee untouched. As to this, I am in a position to infer that the testator's intention was only to revoke that portion of the codicil which was covered in the event of his having effectually substituted another bequest in its place, and thus the doctrine of dependent relative revocation becomes applicable. As to these alterations, the court is at liberty to have recourse to any means of legal proof by which to ascertain the original disposition, and amongst such means, the removal of the strips of paper is the most obvious. I therefore direct that the strip on which is written the word *ten*, as well as the strip on which are written the words *which will be found*

with (to which the same remarks are applicable) be removed in the registry from the codicil, and that probate be granted of that instrument in its unaltered condition.[60]

LOCKE v. JAMES.

(Court of Exchequer, 1843. 11 M. & W. 901.)

PARKE, B.[61] The material facts in this case were as follows:

Ralph Nicholson, by his will, duly signed and published in the presence of and attested by three witnesses, devised certain real estates in Essex to his son Ralph Nicholson in fee, charged with the payment of an annuity of six hundred pounds to his daughter Elizabeth James, the defendant, for her life, with the usual powers of distress and entry; and after various other devises and bequests, he gave all the residue of his estate, after payment of his debts, and the legacies and annuities thereinbefore bequeathed, and the duty payable thereon, to his said son, his heirs, executors, and administrators. On the 15th of August, 1830, the testator with his pen erased the word "six," in the gift of the annuity, and wrote over it the word "two," leaving, however, the word "six" still legible; and on the same day, he signed a codicil in the presence of and attested by one witness only, mentioning that he had on that day made the above-mentioned alteration.

The testator died in December, 1831, and his will and codicil, with other codicils not material to be now considered, were duly proved soon after his decease, and the executors possessed themselves of his personal estate, which was more than sufficient to satisfy his debts and legacies, including the annuities.

The plaintiffs are the parties entitled to the real estate under Ralph Nicholson, the devisee, and they have brought the present action, which is an action of trespass for seizing their goods under a distress. The question is, whether the defendant is entitled under the will and codicil to an annuity of £600 per annum, or to an annuity of £200 per annum only. If she is entitled to £600 per annum, then it is admitted that the distress was lawful, and that this action cannot be maintained.

It was not, and indeed could not have been, disputed, but that if the annuity had been charged on the real estate only, then neither the erasure nor the codicil would have affected it. The erasure would have had no effect, because the testator did not mean to destroy the

[60] Twenty years later, in Ffinch v. Combe, [1894] P. 191, it proved possible to decipher certain of the words under the pasted slips on this will by placing a piece of brown paper around the slips and holding the document against a window pane, and the words thus read were accordingly included in the probate.

[61] The statement of facts is omitted.

annuity of £600 per annum in any other way than by substituting for it an annuity of £200 per annum. The substitution in the will was inoperative, having been made after the subscription of the witnesses, not in their presence, and without republication; and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an act done by mere mistake, sine animo cancellandi. What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all. The codicil or memorandum, being unattested, clearly could have no effect on the disposition of the real estate.

But on the part of the plaintiffs, it is argued, that, taking such to be the law where the gift relates to real estate only, yet here the case is different, for that, looking to the whole will, the personal estate would be the primary fund for payment of the annuity, the real estate being liable only in case the personal estate should be deficient. And then it was said, the erasure and codicil together would certainly have the effect of reducing the annuity, so far as it was payable out of the personal estate, and so, by necessary consequence, must affect the real estate, which is merely charged by way of security, in case the personal estate should be insufficient. And in support of this proposition the plaintiffs relied mainly on the case of Brudenell v. Boughton [2 Atk. 268], before Lord Hardwicke. The defendant's counsel, on the other hand, contended that, even supposing Brudenell v. Boughton to have been well decided, yet it did not apply to a case like the present, but only to the case of a general charge of legacies; and he referred to The Attorney General v. Ward [3 Ves. Jr. 327], Kirke v. Kirke [4 Russ. 435], Beckett v. Harden [4 M. & S. 1], and other cases.

We do not think that, in order to decide this case, we are bound to discuss, or indeed that we should be warranted in discussing, the question as to what effect a court of equity might give to the acts of this testator. The question for our decision is a mere legal question. The testator by his will gave to the defendant a legal interest in his lands (for an annuity charged on land, with a power of distress, is clearly a legal interest), and what we have to decide is, whether that legal interest has since been altered. We are clearly of opinion that it has not. It is clear, that if the annuitant had nothing but the land to resort to, her interest would have remained unaltered, for the reasons already mentioned, and the circumstance that she may, through the medium of a court of equity, have another fund liable to her demand, cannot possibly affect our judgment. A court of law cannot look to anything but the legal rights of the parties; if, by means of the erasure and codicil, that which was originally a right to or a security for £600 per annum, has now become a security for £200 per

annum only, the parties injured by the attempt to enforce the larger demand must have recourse to a court of equity for relief. The legal interest remains as it was originally.

That legal interest is a rent-charge of £600 per annum, created by a will duly executed and attested. The gift of this legal interest has not been cancelled, for the erasure was made sine animo cancellandi. It has not been affected by the codicil, for the codicil is not duly attested, and therefore cannot even be looked at, so far as the real estate is concerned. On this short ground there must be judgment for the defendant.[62]

In re KNAPEN'S WILL.

(Supreme Court of Vermont, 1903. 75 Vt. 146, 53 Atl. 1003, 98 Am. St. Rep. 808.)

STAFFORD, J. The testatrix made and executed her will in due form of law, and the same is still decipherable. But afterwards she attempted to make various changes therein without complying or attempting to comply with the requirements of the statute; and the question is threefold—whether the will is to be established as it was when it was executed, disregarding the attempted changes; or to be disallowed as having been wholly revoked thereby; or to be established as originally executed, except as to certain clauses, and as to those to be treated as revoked by cancellation.

The will, as executed, made some special bequests, and several money bequests, and then added a residuary clause in favor of the testatrix's two sisters, Susan Tupper and Margaret Vaux. In this clause a pen and ink line has been drawn through the name "Margaret Vaux." In the margin opposite has been written in ink the word "deceased"; and at the end of the clause have been added, also in ink, the words, "Share with Mrs. Ada Stabb." The original will was typewritten, and all the attempted changes made with a pen are, it is agreed, in the handwriting of the testatrix.

In one of the early clauses there was a bequest to the same Margaret Vaux of five hundred dollars. Here the name "Margaret" has been drawn through with a line in ink, and the word "deceased" written in the margin opposite; and to the clause have been added the words, "to be given to Mrs. Ada Vaux Stabb."

The next clause originally read as follows: "I give and bequeath to

[62] See Brooke v. Kent, 3 Moo. P. C. 334 (1840); Goods of Nelson, N. R. 6 Eq. 509 (1882). In Gardner v. Gardiner, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383 (1889), the testatrix attempted by an unattested alteration to increase a gift of one undivided fourteenth of her estate to that of one undivided twelfth and the will as originally executed was established. In In re Wilcox's Will (Sur.) 20 N. Y. Supp. 131 (1892), legacies of $7,000 were changed to $11,000 without attestation by the erasure of the letter "s" in "seven" and the substitution therefor of the letters "el," and the will as originally executed was established.

the two daughters of my said sister Margaret Vaux, Bessie and Ada, each, the sum of three hundred dollars. I also give to the said Bessie and Ada, each, one half dozen silver teaspoons. I also give to the said Ada Vaux my gold watch." The changes made are these: The name "Bessie" has been drawn through with an ink line where it first occurs and marked over with a pencil in the other place. The word "watch" has been marked over with a pencil. To the clause have been added in ink the words, "To be given to Mrs. Ada Vaux Stabb;" and these words have been marked over with a pencil.

In the next clause but one, a bequest of two hundred dollars has been changed by writing in ink the word "four" over the word "two," and by writing in the margin the word "four" and the figures "400." In the next clause the name of the legatee and the words designating the amount have been drawn through with an ink line. Other similar changes have been made. New bequests have been written in the margins, and one of these has been marked over with a pencil.

First, then, do the attempted changes constitute a revocation of the will? V. S. 2354, following the English Statute of Frauds, declares: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction." Do the alterations amount to a revocation of the will by cancellation?

The agreed statement of facts does not say that the alterations were made with the intention of revoking the will, and, judging from the alterations themselves, there was no intention to revoke the will as a whole, but, on the contrary, an intention to have it stand with certain changes. There is no interference with the formal parts, and no intention to revoke the whole is anywhere expressed. In these important respects the case differs from Warner v. Warner's Estate, 37 Vt. 356, 367, where the testator had written across one page of the instrument, "This will is hereby cancelled and annulled," and under the filing on the outside, "Cancelled and is null and void. I. Warner," and had erased the words, "In testimony whereof I have." We think the attempted changes in the present case cannot be said, as matter of law, to amount to a revocation of the whole will by cancellation, for although they would, if effectual, make of it a very different instrument, yet it cannot be said therefrom that the testatrix would not have left the instrument as it was in the first place, rather than have died intestate.[68]

[68] In Dammann v. Dammann (Md.) 28 Atl. 408 (1894), a will was so marked up by erasures, interlineations, and marginal notes that, although some items were not specifically erased, the court was convinced, and held, that the testator intended to revoke the entire will by cancellation at all events, and to make a new one later. See, also, Muh's Succession, 35 La. Ann. 394, 48 Am. Rep. 242 (1883).

The interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will, which was properly executed in its original form. Wheeler v. Bent, 7 Pick. (Mass.) 61; Jackson v. Holloway, 7 Johns. (N. Y.) 394.

Do any of the attempted cancellations of separate clauses constitute a revocation of the will to that extent? If we admit that in some circumstances there may be a partial revocation, we have to take note of certain complications in the present case. This will contains a residuary clause, and every cancellation of a money legacy, and probably, as this will is written, every cancellation of a specific legacy as well, works a corresponding increase in the residuary clause. Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32. If there had been no residuary clause, the cancellation of a legacy would merely have left that part of the estate to be distributed as if no will had been made, and the rest of the will would operate as before; but here the cancellation gives the residuary clause a different operation. This has been held to prevent the attempted cancellation from operating as a partial revocation. Miles' Appeal, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176.

But if we should hold otherwise upon this point, as was done in Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32, we must notice a further difficulty. The testatrix has attempted to substitute a new residuary legatee in place of her deceased sister, Margaret; thus coupling the cancellation of previous bequests, and the consequent enlargement of the residuary bequest, with the substitution of a new residuary legatee; so that it is impossible to say that she would have desired to make any of the cancellations if she had not supposed that the new residuary legatee would receive the benefit arising therefrom. In short, the alterations, when taken together, rebut the presumption of an intention to cancel any clause by itself and independently of other attempted changes and additions which are ineffectual for want of formality.

An act which might otherwise amount to a cancellation of an entire will has been held not to work that result because accompanied by other acts showing that the intention to cancel was conditional, and not absolute, as where the testator wrote upon the will the word "Cancelled," but further wrote that he intended making another will, "whereupon I shall destroy this." In re Brewster, 6 Jur. (N. S.) 56, 29 L. J. P. & D. 69; Woerner's Am. Law of Administration, § 48, with citations. So, likewise, where the testator includes an express clause of revocation in a later will, which fails to take effect through some defect therein, but not where it fails through some cause dehors the instrument. Hairston v. Hairston, 30 Miss. 276.

Jarman on Wills, vol. 1, p. 294, states the rule thus: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore

if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails, also, and the original will remains in force." The words "or any other cause" may give the rule too much breadth, but they may be omitted without impairing the rule for our purpose. Similarly it is said with respect to partial obliterations or cancellations that if they are made with the intention of substituting other words for those cancelled, and such intention is frustrated, there is no revocation. Woerner's Am. Law of Administration, § 49; Jarman on Wills, vol. 1, p. 295, with the cases cited by both authors.

As before remarked, the agreed statement upon which this case is tried, while it says that the alterations are all in the testatrix's handwriting, does not say with what intention they were made. Consequently we can assume only such intention as the acts necessarily imply. The intention to revoke is indispensable to a revocation, whatever the act may be; and here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependently upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing; and the will must be established as it was originally executed.

Judgment reversed and cause remanded.[64]

In re TOUSEY'S WILL.

(Surrogate's Court, New York County, 1901. 34 Misc. Rep. 363, 69 N. Y. Supp. 846.)

THOMAS, S. The contestant concedes that the papers offered for probate were duly executed by the decedent as her last will and codicil thereto. The sole ground of contest is based on a recital in the will to the effect that the decedent was unmarried and had no "direct heirs." A cousin who had not seen her or communicated with her, either directly or indirectly, for over 40 years before her decease, contends that he is a "direct heir"; that he was missing, and his whereabouts were not known to the members of his immediate family, for some years; that the inference to be drawn from the language of

[64] In Simmons v. Rudall, 1 Simons (N. S.) 114 (1851), Wolf v. Bollinger, 62 Ill. 368 (1872), and Thomas v. Thomas, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639 (1899), gifts to one person in a will were canceled and another person's name substituted by unattested interlineation, and the original beneficiary was allowed to take. In Goods of Greenwood, [1892] P. 7, the original executor was allowed to act in place of the one whose name was substituted by unattested interlineation.

the will is that the decedent mistakenly supposed him dead, and made the will because of this mistake; and that as against him she died intestate. Second cousins were mentioned by name in the will, and it is clear that the decedent did not regard them as "direct heirs." She probably used the word "direct" for "lineal," and I am not satisfied that she made any mistake whatever.

The doctrine of dependent relative revocation includes as one of its branches, and applies to an attempted revocation of a testamentary provision which upon some ground of mistake is held inoperative. If applicable to a will, it must appear clearly, from the will itself, not only that there has been a mistake made by the testator, but also just what he would have done in case there had been no mistake. Gifford v. Dyer, 2 R. I. 99, 57 Am. Dec. 708. Where a legacy was made by a will, and in a codicil revoking it it was recited that the legatee was dead, such revocation was held inoperative on proof that the legatee survived the testator (Campbell v. French, 3 Ves. 321); but, even in case of revocation by codicil, the rule has been applied with caution, and the mistake must appear on the face of the codicil as the sole moving cause to induce the revocation (Skipwith v. Cabell's Ex'r, 19 Grat. [Va.] 758).[65] An apparent mistake as to a matter of fact, as to which the testator must have had full knowledge, is not sufficient. Mendinhall's Appeal, 124 Pa. 387, 16 Atl. 881, 10 Am. St. Rep. 591.

In no case which has been brought to my notice has a will been refused probate, or has any attempt been made to correct or change its provisions, on proof extraneous to the document of a mistake by the testator as to a fact which might possibly have led him to do something different from what he has done. On the contrary, the cases in the courts of this state, which require the testator's directions to be followed, even though it may be made quite clearly to appear that he was actuated by erroneous opinions on questions of fact, are quite numerous. In re Bedlow, 67 Hun, 414, 22 N. Y. Supp. 290; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; In re Harris' Will, 19 Misc. Rep. 388, 44 N. Y. Supp. 341; Creely v. Ostrander, 3 Bradf. Sur. (N. Y.) 107.

The objections of the contestant must be overruled, and the will admitted to probate.*

[65] In this case the codicil, dated November 27, 1861, read, "In consequence of the state of the country, I now revoke my bequests," and it was contended that the testatrix revoked the bequests because she erroneously believed that they would be confiscated under the sequestration act of the Confederate States. The court refused "to go outside of the will and to ascertain what were the particular views and opinions of the testatrix, so as to lay the foundation for a case of mistake." See, also, Newton v. Newton, 12 Q. Ch. 118 (1861); Dunham v. Averill, 45 Conn. 61, 29 Am. Rep. 642 (1877).

* This case is inserted here to bring out the distinction between the case of the making of a will under a mistaken notion about the possible or actual beneficiaries and the case of the revocation, under such misapprehension, of a testamentary provision already made.

Appeal of STRONG.

(Supreme Court of Errors of Connecticut, 1906. 79 Conn. 123, 63 Atl. 1089, 6 L. R. A. [N. S.] 1107, 118 Am. St. Rep. 138.)

BALDWIN, J.[66] * * * The paper presented to the court of probate as the will of Miss Strong was in a condition which had some tendency to show that she had revoked it. It had been torn and it had been marked by her as "Superseded by written one." It has not been found by the superior court that she tore it, but we shall treat the case as if such a finding had been made, and as if whatever she did was done before she became delirious in her last illness.

No act of tearing or cancellation destroys a will unless it be done with the intention of revoking it. An intent to revoke may be either absolute and final, or dependent on the existence, or a belief in the existence of circumstances. The words "Superseded by written one" sufficiently indicate that when Miss Strong wrote them she assumed that the draft in her handwriting then had full testamentary force and effect, and so, as it covered the same ground in a different manner had destroyed her previous dispositions by will.

These were treated as destroyed simply because they had been replaced by something else. Here she was acting under a mistake, and one apparent from the words used to effect the cancellation. This mistake was plainly the sole cause for the revocation which she intended to declare. Unless she exercised the power of disposition given her by Mr. Harris, the fund which was subject to it would go to strangers to her blood. The main object both of the will and of the draft will was to exercise it. The case, therefore, is within the reason of the rule that a writing purporting to revoke a will on account of the existence of a certain fact does not revoke it if there be no such fact. Dunham v. Averill, 45 Conn. 61, 80, 29 Am. Rep. 642.

It is true that the mistake is, at bottom, one of law. Miss Strong supposed that her unsigned and unattested will would have full effect upon her decease. In law it had no effect. But as respects a question of this nature, it is immaterial whether the mistake under which the act of revocation was done were one of fact or law. The act was nothing unless done with the intent of revocation. If the intent to revoke was, as in this case, clearly dependent on a reliance upon a certain legal consequence attributed to certain circumstances, an error in attributing that effect to them is as effectual a bar to an actual revocation as if it were a pure error of fact. Security Co. v. Snow, 70 Conn. 288, 294, 39 Atl. 153, 66 Am. St. Rep. 107; Stickney v. Hammond, 138 Mass. 116, 120; Clarkson v. Clarkson, 2 Sw. & Tr. 497.

The expression of the motive for the act of cancellation must govern the result of the act of tearing the will. The will and draft will having been found in the same envelope, it is evident that whatever

[66] Part only of the opinion is given.

Miss Strong did constituted one transaction proceeding from the same intent and actuated by the same cause. It is found by the superior court that the will signed in 1897, was executed in all respects according to law, and that Miss Strong was then of full age and sound mind and memory. It should, therefore, have been admitted to probate.

The superior court is advised to disaffirm the decree of the court of probate, and admit the paper propounded as the will of Miss Strong to probate, as such.

CHAPTER VIII

THE REPUBLICATION AND REVIVAL OF WILLS

SECTION 1.—STATUTES

WILLS ACT (1837).

XXII. And be it further enacted that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed with reference to the real and personal estate comprised in it as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

7 Wm. IV & 1 Vict. c. 26, §§ XXII–XXIV (1837).[1]

[1] "Under the Statute of Frauds, to republish a devise of freehold estate required an attestation by three witnesses; while, on the other hand, a will might have been republished with respect to copyhold and personalty without any attestation. It was not often necessary, however, to inquire as to the republication of wills of personal estate, inasmuch as a residuary bequest, even under the old law, embraced all that species of property of which the testator died possessed; so that republication (which merely caused the will to speak and operate from the period of its being republished) had no effect in enlarging the operation of such a bequest." 1 Jarman on Wills (6th Ed.) *157.

Prior to the Statute of Frauds a republication of a will of realty could be by parol. Beckford v. Parnecott, Cro. Eliz. 493 (1596). Compare Jones v. Hartley, 2 Whart. (Pa.) 103 (1837).

SECTION 2.—REPUBLICATION

CARLETON ex dem. GRIFFIN v. GRIFFIN.

(Court of King's Bench, 1758. 1 Burr. 549.)

Ejectment, brought upon the demise of the heir at law. The defendant claimed under a will dated May 2, 1752. That will was written by the testator himself and signed by him, but there was no seal nor witness to it. January 5, 1754, the testator wrote on the same piece of paper certain gifts of personal property to his wife, and in this additional writing said: "And this not to disannul any of the former part made by me, the 2d of May, 1752; except that my wife shall not be liable to pay to my son John," etc. The exception did not relate to the real estate. The testator signed this additional writing in the presence of three witnesses. And then he took the said sheet of paper in his hand and declared it to be his last will and testament, in the presence of the said three witnesses; and then delivered it to them and desired they would attest and subscribe it in his presence and in the presence of each other; which they accordingly did.

A verdict having been given for the plaintiff subject to the opinion of the court, the first question was:

(1) Whether the republication of the said first will (made in 1752) upon the 5th of January, 1754, be a publication or republication of his first will, within the statute of frauds.

Mr. Justice DENISON.[2] A man may make his will at different times; and the witnesses may attest at different times. Here, an illiterate man makes and signs his will, in which there is a devise of lands. To be sure, if he had died before attestation, the devise of the land had not been valid. But afterwards, he adds more to it, on the same sheet of paper, and declares, "that he does not thereby mean to disannul any part of his former devise and disposition," and signs it, and then takes the sheet of paper in his hand, and declares it to be his last will and testament, in the presence of three witnesses, and desires the witnesses to attest it, which they do in his presence, &c.

This must be considered as one entire will, made at different times; and attested agreeable to the statute of frauds. * * *

Mr. Justice WILMOT. He also considered this as an entire instrument, and as a continuation of the former act. * * *

And the testator's having originally signed the former part is out of the case, and makes no difference; for it was not at all necessary or material to it, as a will of personal estate, and the signing alone,

[2] The statement of facts is abbreviated, the opinion of Lord Mansfield is omitted, and part only of the other opinions is given.

unattended with the other requisites, was not sufficient to render it effectual as a will of land. Therefore it was totally immaterial. * * *

PER CUR. (unanimously). Let the postea be delivered to the defendant.

WILLIAMS v. GOODTITLE.

(Court of King's Bench, 1830. 10 B. & C. 895.)

Ejectment for lands in Glamorganshire. Plea, not guilty. At the trial at the spring great sessions for the county of Glamorgan, 1828, the jury found a special verdict, the material parts of which were as follows: That David Thomas, being seised in fee of certain real estates, on the 24th of April, 1795, made his will in writing, duly executed and attested, for passing real estates, whereby, after various other devises, he gave and devised "all the rest of his real estate whatsoever and wheresoever situate, not therein before particularly devised, unto his wife Elizabeth Thomas, her heirs and assigns, absolutely forever." That afterwards the testator purchased other real estates (part of which formed the subject-matter of this ejectment), and afterwards made a codicil in writing, duly executed and attested, to pass real estates as follows: "Whereas I did by my last will and testament in writing, duly executed and attested, give, devise, and bequeath all the real and personal estate I was then possessed of in the manner therein mentioned, and which said will I do hereby ratify and confirm." The testator then recited, that since the date of his said will he had purchased other property, including that now in question, and devised the same to his wife for life, and after her death he devised the part thereof now in question to trustees upon trusts that were bad in law, and the residue specifically to certain persons in fee. The testator died on the 19th July, 1814, leaving his wife him surviving, and the defendant Elizabeth Williams his heiress at law. Elizabeth Thomas, the widow of the testator, died, before the date of the demise in the declaration, intestate, leaving John David, the lessor of the plaintiff, her heir at law. Upon this verdict the court of great sessions gave judgment for the plaintiff, whereupon a writ of error was brought and the common errors assigned.

Lord TENTERDEN, C. J. I am of opinion that the will and codicil are to be considered as one instrument made at the date of the codicil. Then it appears that there is a devise to the wife for life, then certain other devises follow, and, lastly, there is a general residuary clause in favor of the wife. It is admitted that, if all that were in a will, the particular devise and residuary clause might well stand together, and the wife would take under the residuary clause. Now I think that the expression at the commencement of the codicil in question shows the intention of the testator to have been to ratify his will as to all

that he was possessed of at the time of the ratification, and that being so, the lessor of the plaintiff below, as heir at law of the widow, was clearly entitled to recover. Judgment affirmed.[3]

In re CHAMPION.

DUDLEY v. CHAMPION.

(Supreme Court of Judicature, Court of Appeal. [1893] 1 Ch. 101.)

LINDLEY, L. J.[4] This case does not present much difficulty. The testator by his will devised a freehold cottage and the land and appurtenances thereto belonging, which he described as "now in my own occupation," to trustees upon certain trusts. After the date of his will he bought two other fields adjoining the cottage, and then he made a codicil shortly before his death by which he substituted other trustees for those named in his will, and confirmed his will in other respects. This codicil having been made after the purchase of the two fields, what is its effect upon the devise contained in the will? In my opinion, it is quite clear that the two fields, which as well as the cottage were in his own occupation when he made the codicil, passed to the trustees together with the cottage and its appurtenances. This was the first point argued, and on it there can be no doubt. * * * The appeal must therefore be dismissed.[5]

BOWEN and A. L. SMITH, L. JJ., concurred.

[3] "That a codicil makes the will speak as of its own date must be admitted to be the general rule; but it may nevertheless be framed in such a manner as to operate as a partial republication only, or to work no republication at all. If, for example, I leave by will all my farms at Dale to A., and, having afterwards acquired another farm at Dale, I say in a subsequent codicil, 'I hereby give to B. the identical farms which my will has given to A.,' it would obviously be doing violence to the language to construe those words as carrying the newly acquired farm." Brougham, L. C., in Monypenny v. Bristow, 2 Russ. & Myl. 117, 132 (1832). "If, therefore, the language of the original will be such as, if used at the date of the republication, it would not include the after-purchased estate in its terms or description, or if the act of republication be accompanied with other provisions, indicating that it was the intention of the testator to limit the operation of the will, as republished, to the same estate which was given, and which would legally pass by the original will, then, notwithstanding such republication, the devise will not include the after-purchased estate, because, although the power then exists to devise, yet the intent is wanting, and, as both do not concur, the after-purchased estate does not pass." Shaw, C. J., in Haven v. Foster, 14 Pick. (Mass.) 534, 541 (1833). Compare In re Portal and Lamb, 30 Ch. D. 50 (1885), where, however, there was no codicil.

[4] The statement of facts and the opinion of North, J., in the court below are omitted, and part only of the opinion in the Court of Appeal is given.

[5] But compare the following remarks of Lord Cranworth, V. C., in Stilwell v. Mellersh, 20 L. J. Ch. 356, 361, 362 (1851):

"In my opinion, then, when it is said a codicil republishing a will, or confirming a will, makes the will speak from the time of republication, that does not mean that you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment

In re GOODS OF TRURO.

(Court of Probate, 1866. L. R. 1 P. & D. 201.)

The Dowager Lady Truro died on the 21st of May, 1866, leaving a will dated the 15th of September, 1865, and a codicil dated the 10th of October, 1865. The will contained the following clause: "I likewise bequeath to the present Baron Truro, in affectionate recollection of his kindness to me, all my library and books and maps, except such parts thereof as I shall herein or after or by codicil otherwise dispose of; and also all my engravings, paintings, pictures, and drawings, save and except such parts thereof as I shall herein or after or by codicil otherwise dispose of; also all my household bed and table linen, and also all such articles of silver plate and plated articles as are contained in the inventory signed by me and deposited herewith."

The will was deposited by the deceased at Messrs. Coutts', the bankers, in an envelope with an indorsement in her writing, and in the same envelope with the will was found an inner envelope containing a list of plate. The list, which was in several sheets, was headed "List of plate and plated articles left by my will dated the 15th of September, 1865, to the present Baron Truro. Augusta E. Truro." The list was signed by the deceased in several places, and on the last sheet was her signature and the date, 21st of September, 1865. Affidavits were filed showing that the will and the list were deposited with Messrs. Coutts on the 21st of September, 1865, and that the codicil

after he had executed it. What absurdities otherwise would arise. Suppose I by my will say I give £500 to the present treasurer of Lincoln's Inn, and this day twelve months I republish my will, does that alter the party who is to take the legacy? That must be so, if it is to be read as if I had written it over again; the 'present' treasurer would be a different person. So I conceive if I had said, I devise all the estates of which I am now seised. I afterwards purchase lands and republish my will. I confess I think the same principle applies as governed Lord Cottenham in Cole v. Scott [1 Hall & Tw. 477]. My will must be read in the same way as if I had said, I give all the lands of which I, on this 24th day of March, 1851, am seised, and if I republish that in 1852, it will still be read just as it was before; it will refer only to that which is there mentioned. Now, the cases in which this question has often arisen and with which we are familiar are these: where a party says by his will, 'I give all my lands,' what does that mean? All the lands that I have power to give. When, a year afterwards, I republish that will, having intermediately purchased lands, it will apply to the after-purchased lands. It is to be read just as if I had put in those words, 'all the estates which I had power to give.' Therefore, it seems to me that the distinction is manifest between an express date or an express name fixed upon. You cannot alter that by saying you republish the will at a different time. You do republish it so as to make it operate from that other later time, and if there be any legal effect that is brought to operate by what has taken place in the mean time, you have the benefit of that. But you cannot alter the meaning of the will, which you will be doing if, by republishing the will, you are to treat the testator as having meant something by his will different from that which he has there expressed. With regard to the case in the Court of Error of Williams v. Goodtitle [10 B. & C. 895], I think that is all perfectly intelligible and right. A testator there, under the old state

was deposited at a subsequent date. One of the affidavits also proved that when the will was executed the attention of the testatrix was called to the importance of signing the inventory and depositing it with her will, and that she intimated her intention of acting upon that suggestion.

The Queen's Advocate and Dr. Spinks moved for probate of the will of the 15th of September, 1865, the list of plate dated the 21st of September, 1865, and the codicil of the 10th of October, 1865.

Sir J. P. WILDE. I have very serious doubts whether I could allow this list to form part of the probate if the question depended upon the words of the will, because, although to some extent they point to an existing document, I should, construing them by the existing facts, read them as meaning, not that the document had been signed at the time when the will was executed, and would be deposited with it, but as meaning that it would be signed and deposited when the will should be deposited. There is no distinct reference to an existing document. For, though the testatrix, in using the words, "signed by me, and deposited herewith," would prima facie seem to mean "now already signed and deposited," yet those words, like all others in a written document, must be construed in connection with the existing and surrounding state of things. Now, the will could not have been deposited at the time at which the testatrix was speaking, and the list when produced was plainly not signed till the 21st of September. The true meaning, therefore, of the words, as spoken at that date, would seem to be, "a list which I intend to sign and deposit," etc. It is, however, unnecessary to decide whether the list is incorporated with the will,

of the law, devises all his lands: that passes all he was then seised of; he republishes his will afterwards by a codicil, the legal effect of that is to pass after-purchased land, because the will speaks from that time. In both cases it means all the lands he had power to dispose of by law. The effect could not be altered by the circumstance that in his codicil he truly recites that by his will he had devised all he was then seised of; it only states what is the legal effect of his will. He republishes his will: the legal effect of republishing it must have its full operation. It does not seem to me that that case at all presses upon me. I was turning in my mind whether I could recollect any cases in which there was this sort of devise, 'I give to all my present children,' then an after-born child, and a codicil republishing the will: certainly, according to my impression, that would not give to the after-born child. I am not clear that that would quite govern the case, because the courts have stretched a good deal about children in a way that they have not done in other cases. I rather think that it would not. At the same time, I was not prepared for this sort of argument, and have therefore not looked into the point. If, upon looking into it, or being assisted by any suggestion from counsel on one side or the other, anything should be brought to my mind to show I am wrong, I should be most ready to admit it, and the more so because I do firmly believe that this would have been what the testator would have wished to do if his attention had been called to it. I think, although I cannot so construe what he has written, I do form a very shrewd guess as to what he would have written if his attention had been called to it, and he would have wished to write something which would have the meaning that it is contended the republication of the will does give to it. I do not find that within the four corners of the will, therefore I do not act upon it as the intention which is to govern me."

because I am of opinion that it is entitled to probate by force of the codicil.

This makes it material to look into the decisions on the subject. The general rule as to the consequences of republication is thus laid down by a most careful and learned text-writer: "It has long been settled law that the republication of a will is tantamount to the making of that will de novo; it brings down the will to the date of the republishing, and makes it speak, as it were, at that time. In short, the will so republished is a new will." Williams on Executors (5th Ed.) pt. 1, bk. 2, p. 188, § 2.

He then goes on to refer to numerous cases which have been decided in accordance with this principle, and amongst others to Skinner v. Ogle, 4 N. of C., at page 79, where it was held that "a codicil duly executed will give effect and operation to a will altered after the passing of the act, although the alteration was not duly attested, and though the will itself was executed before 1838," and to In the Goods of Hunt, 2 Robert. 622, where Sir John Dodson held that a codicil duly executed will give effect to unexecuted papers which have been written between the periods of the execution of the will and the codicil, although the latter does not refer to the former.

The question came before Sir C. Cresswell in March, 1863, In the Goods of Stewart, 3 Sw. & Tr. 192, and in June, 1863, In the Goods of Matthias, 3 Sw. & Tr. 100. In the first case, the will contained this clause: "I direct my executors to distribute all pictures, books, and other articles according to any list or lists signed by me." A paper was found without any date, but which was executed before a second codicil, headed "List referred to in my will and codicil." The second codicil commenced "This is a codicil to the last will and testament of me. * * * I hereby confirm my last will with all the codicils thereto duly signed by me." "Held that the unattested paper was sufficiently identified and referred to in the will, and having been signed before the execution of the codicil was entitled to be admitted to probate as a portion of the will confirmed by the codicil."

In the second case the testatrix executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862. On her death the will and two codicils and a paper headed "Memorandum of trinkets referred to in my will" were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was executed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it. It was held "that the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate." The learned judge is reported to have said: "Assuming it as a fact that the memorandum was in existence before the date of the last codicil, can that

entitle it to form part of the probate? There is nothing to show that the memorandum was in existence when the will was signed; it therefore formed no part of the will. How can the execution of the codicil, which is a re-execution of the will, make that to be a part of the will which was no part of the will before, and the codicil contains no reference to the memorandum?" And accordingly probate of the memorandum was refused.

Now there is no doubt that probate could not have been granted of that memorandum, because, treating the will as having been re-executed at the date of the second codicil, the reference was not sufficient to incorporate it according to the rule laid down in Allen v. Maddock, 11 Moo. P. C. 427. But if the language of the learned judge was intended to have a universal application, if it is to be taken as laying down a general rule that by the kind of re-execution of a will which is involved in the execution of a codicil nothing can be inferentially added to a will which it did not contain before, it is at variance with the decision of the same learned judge in In the Goods of Wyatt, 2 Sw. & Tr. 495. In that case a testator executed a draft will in April, 1847, and an engrossed will in May, 1847. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. The draft will contained interlineations and cancellations in the testator's handwriting in ink and in pencil. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink but not as altered in pencil. Probate was decreed of the draft will of April, 1847, including the alterations in ink, in so far as they agreed with the will of May, 1847, together with the codicil of 1854, but not those in pencil. If the proposition laid down by the learned judge in In the Goods of Matthias [supra] is a general one, that decision cannot be supported. I think that the proposition is not a general one, but must be read in reference to the case to which it refers.

After considering these cases I have come to the following conclusion as to the rule by which the court should in future be guided in dealing with the republication of a will by a subsequent codicil:

It is plain on the one hand that the republication of the will, which is involved in the execution of a codicil, may have the effect of adding something to the will which formed no part of it when executed, and which is not to be found in the codicil itself. The case just quoted, In the Goods of Wyatt, 2 Sw. & Tr. 494, in which the codicil was held to give effect to alterations made in the will after its execution, is a direct authority for this proposition. On the other hand it is plain that there must be a very distinct limit to the action of the court in this direction. For the tendency of such a doctrine, if not restrained, would be to place unexecuted papers on the same footing with those which have received due execution, merely because they were in existence at the subsequent date of the execution of a codicil.

The court cannot, according to the authorities, give greater or less effect to a codicil than this: To treat its execution as if the testator had at the same time sat down and re-executed his will. Looked at in that light, the following rule would appear to be the consequence: Where the will, if treated as executed on the date of the codicil, and read as speaking at that date, contains language which, within the principle of Allen v. Maddock [supra] would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date.

Applying that doctrine to the present case, and treating this will as having been re-executed on the date of the codicil, its language runs thus: "And also all such articles of silver plate and plated articles as are contained in the inventory signed by me and deposited herewith." Now, construing these words by the light of the events which had then happened, they appear with sufficient distinctness to refer to a document then existing. For the inventory referred to had then been signed by the testatrix and deposited at the bankers. The operation of the codicil as a re-execution of the will, therefore, gets rid of all difficulty, and I admit the will and the codicil to probate, together with the inventory signed by the testatrix.

In re GOODS OF REID.

(Court of Probate, 1868. 38 L. J. [N. S.] P. & M. 1.)

Mary Reid, late of Oxford Parade, Cheltenham, in the county of Gloucester, widow, died on or about the 19th of October, 1867, leaving a duly executed will and codicil. The will bore date the 24th of May, 1864; the codicil was not dated, but it appeared from the affidavit of the attesting witnesses that it was executed in the latter part of April or the beginning of May, 1866. By her will she gave all her ready money to her executors, "to pay her funeral expenses, &c., as also some small sums as remembrances to friends, to be named in a letter addressed to my two nieces, Margaret G. Thain and Lilias Thain," whom she appointed residuary legatees. In disposing of certain sheep in Australia, she divided the flock into four parts. Three of these she specifically bequeathed, and then continued, "the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter."

The codicil ran thus: "In consequence of some deaths in our family, it is necessary that I add a short codicil to my will, &c. In the

first place, my set of pearl ornaments, which I then left to Mary Eweretta Thain, in consequence of her early and melancholy death, so much lamented by us all, I must now destine to someone else, and as Mrs. Thain has no female in her family that either she or I would wish to possess those family jewels, I now leave them as intimated in the letter addressed to my residuary legatees."

The will and codicil were found in an envelope in a sealed parcel. In the same parcel, but in a separate envelope, two unexecuted testamentary papers were also found. Paper No. 1 bore date the 1st of March, 1866, and commenced thus: "To my dear nieces, Margaret G. Thain and Lilias Thain, named in my last will and testament as my residuary legatees, and to whom I there stated it was my intention to address to them a letter which I wish to be equally binding and legal as if its contents had been expressed in the will itself. This my intimated intention I now shall endeavor to perform." The paper gave trifling legacies to certain friends and acquaintances, and also referred to her pearls—this reference and some other portions of the document being in pencil.

Paper No. 2 simply expressed a wish that the fourth part of the sheep in Australia might go towards forming a fund to pay off a debt on a cottage, and had at the foot of it, "Cheltenham, 1865." Both papers were in the handwriting of the deceased.

Dr. Swabey moved for probate of the will and codicil, together with the two unexecuted testamentary papers as incorporated by reference. Although the will does not refer to an existing paper, the unexecuted documents were written before the codicil, and in it the reference "I now leave them as intimated in the letter addressed to my residuary legatees" is a reference to an existing document.

Sir J. P. WILDE. I think that those papers cannot be admitted to probate as part of the will. Dealing with the case as it appears on the face of the will, the unquestionable rule of law is that the will must refer to a paper as existing at the time, and then that the reference must be in such terms that the paper referred to can be fairly recognized. Now this will does not refer to an existing paper at all. It is said very truly that the language of the will is future, and points to a future document; and, further, the document which is asked to be incorporated refers to the fact that the testatrix intended to write such a paper, and it then goes on to say that this is the document which she so intended. It is quite plain therefore that the document referred to in the will was of a future character. But then comes the codicil. In The Goods of Lady Truro, 35 Law J. Rep. (N. S.) Prob. & M. 89, 1 Law Rep. Pr. & Div. 201, it was decided that the effect of a codicil was to make the will speak as if executed on the date of the codicil, but that is all. It was there said, "Where the will, if treated as executed on the date of the codicil and read as speaking at that date, contains language which, within the rule of Allen v. Maddock 11

Moo. P. C. 427, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so, if the will had been originally executed at the later date."

But the language of this instrument, read it as you will, is language of a future character, and therefore it seems to me that it cannot fall within the rule laid down in the case to which I have referred. It is quite true that the effect of the codicil is to bring down the will to that date, and that the codicil speaks of leaving certain jewels "as intimated in the letter addressed to my residuary legatees;" but then the language is ambiguous. It might point to an existing paper, but it might also point to a future paper, and the testatrix herself, when she was obviously speaking of a future paper in the will, used similar language—"the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter." The court cannot see on the face of the will or codicil any distinct reference to an existing document, and still less that these documents existed at the time of their execution. Under these circumstances, the court can only grant probate of the will and codicil.[6]

[6] But see Shaw v. Camp, 163 Ill. 144, 45 N. E. 211, 36 L. R. A. 112 (1896). In that case a sheet of testator's writing making an additional bequest was attached by testator to the will after the will was attested. Still later testator duly executed a codicil to his will. That codicil did not refer to the attached sheet but did refer to the will. It was held that the codicil made the attached sheet—designated in the case as "Sheet B"—part of the will. The court said (163 Ill. 148, 45 N. E. 212, 36 L. R. A. 112): "The authorities fully sustain the position that, if 'sheet B' was attached to the original will at the time the codicil was signed and attested, the execution of the codicil operated as a publication of it, and a republication of the whole will as it then existed; also, that the condition of the instrument at that time, and what the testator's intention was as to what should constitute his will, might properly be shown by parol. Burge v. Hamilton, 72 Ga. 568 (1884); Beall v. Cunningham, 3 B. Mon. [Ky.] 390, 39 Am. Dec. 469 (1843); Van Cortlandt v. Kip, 1 Hill [N. Y.] 590 (1841); Moores v. White, 6 Johns. Ch. [N. Y.] 360 (1822); 1 Redfield on Wills, 288. The jury were justified by the evidence in finding, that the testator wrote and attached 'sheet B' to the original prior to the execution of the codicil. That being so, the reference by the codicil to the will was also a reference to that sheet. * * * The true will of deceased included 'sheet B,' and the circuit court properly exercised its jurisdiction in establishing it as such." Yet in Hunt v. Evans, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185 (1890), where in a will a testator declared that he had deeded certain property in trust, and the statement was held not to incorporate a deed of trust prepared, but not executed, the court had said (134 Ill. 504, 25 N. E. 581, 11 L. R. A. 185): "One instrument cannot be engrafted into another, and become a part thereof, unless the language used manifests an intention that such shall be done." Compare Goods of Heath, [1892] P. 253; Notes v. Doyle, 32 App. D. C. 413 (1909).

In re GOODS OF SMART.

(High Court of Justice, Probate Division. [1902] P. 238.)

See ante, p. 208, for a report of the case.

In re EMMONS' WILL.

(Supreme Court, Appellate Division, First Department, 1906. 110 App. Div. 701, 96 N. Y. Supp. 506.)

HOUGHTON, J. Frederick L. Emmons attempted on the 30th day of December, 1902, to execute his holographic will. The paper is very informal, and makes his mother the sole legatee and devisee; no executor being appointed. It was signed by him, and published and declared as his last will and testament, in the presence, however, of only one witness, whose signature is the only one appearing thereto. On the death of the alleged testator this instrument was found in his safety deposit box, with other papers belonging to him. On the 16th day of May, 1904, the decedent properly executed what is stated therein to be a "codicil to my last will and testament, bearing date ———, 190—." The only provision of this last instrument, in addition to the naming of executors of it and the former alleged will, is a bequest of $10,000 to the intestate of respondent Baruch. The attestation clause and the testimony of the subscribing witnesses show that it was published as a codicil to the alleged last will and testament. The executors named presented both instruments for probate. The appellant filed contesting allegations to the effect that the former paper should not be admitted to probate because it was not attested in conformity with the statute as a last will and testament, and that the latter paper should not be admitted to probate because it was not complete in itself, and only purported to be a codicil to a will which was invalid. The learned surrogate felt constrained to admit both papers to probate, and from such decree this appeal is taken.

The theory of the respondents is that the properly probated and executed codicil, referring to the defectively executed will, validated it and incorporated it in the latter instrument, so that both were entitled to probate. Many English decisions, and those of many of our sister states, give support to the proposition that extraneous unattested documents may be incorporated into a will by proper reference thereto. In this state, however, that doctrine does not prevail, and the rule is that no testamentary provision in other unexecuted or unattested papers can be incorporated into a will. Cook v. White, 43 App. Div. 388, 60 N. Y. Supp. 153, affirmed 167 N. Y. 588, 60 N. E. 1109; Matter of the Will of O'Neil, 91 N. Y. 516; Matter of Conway, 124 N. Y. 455, 460, 26 N. E. 1028, 11 L. R. A. 796. In the Matter of Andrews, 43 App. Div. 394, 60 N. Y. Supp. 141, the question was elaborately dis-

cussed, opinions being written by four of the judges taking part in the decision, and one of the dissenting opinions was written in the expressed hope that the Court of Appeals might be attracted to a renewed consideration of the question and a modification of the rule. Such was not the result, however, for that decision was unanimously affirmed (162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294), and on review of the authorities the doctrine was reiterated.

The rule, however, does not extend to a will properly executed, and which has been rendered inoperative by law, as by marriage of a woman (Brown v. Clark, 77 N. Y. 369), or to one which was executed while the testator was of unsound mind or under restraint (Cook v. White, supra). In such case the instrument, properly executed in form, may be revived and validated by the proper execution of a codicil referring to such instrument, or made for that purpose. Nor does the rule infringe upon the doctrine of revivor and republication of a validly executed will by the due execution and publication of a valid codicil. Matter of Campbell, 170 N. Y. 84, 62 N. E. 1070.

The prior instrument executed by the decedent was not a will, for it lacked the attestation of the two witnesses required by statute, and, being therefore unexecuted and unattested, it could neither be revived by, nor incorporated into, the subsequently validly executed testamentary instrument denominated a "codicil." It is unfortunate that probate must be denied this instrument. The deceased desired and attempted to give all his property to his mother. He was perfectly competent to decide to whom he would give his property, and there is no suggestion that there was any other will, or that the paper produced was not the one to which he referred in his codicil, notwithstanding the fact it is not identified by exact date. The remarks of the court in Matter of Andrews, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294, are peculiarly applicable to the present situation: "It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements. It is better that this should happen under a proper construction of the statute than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills."

The question remains to be considered whether the instrument denominated a "codicil" should also be denied probate. It was undoubtedly the intention of the testator that this instrument should operate in connection with the will which he supposed he had executed, and that it should be an addition thereto. That his intention failed in this respect, however, does not defeat the instrument. The distinguishing feature of a will is that it shall take effect upon death, and the name by which it is called is immaterial. Matter of Probate of Will of Diez, 50 N. Y. 88. A codicil may modify the provisions of a will or supersede them entirely, or simply add to the disposition by introducing

new beneficiaries. A validly executed will may have been lost and be incapable of proof, and yet the codicil, so far as it goes, is operative. Newcomb v. Webster, 113 N. Y. 191, 21 N. E. 77. A codicil executed according to the formalities of the statute is a final testamentary disposition, and, if there be an existent and complete will, it takes it up and incorporates it. Matter of Campbell, 170 N. Y. 84, 62 N. E. 1070. If, however, there be no such existent and validly executed will, and if the codicil be so complete in itself as to be capable of execution, then it must necessarily stand and be given the force of valid testamentary disposition.

The codicil in question, so far as it goes, is entirely complete. The carrying out of its provisions in no sense depends upon the will to which it attempts to refer. It simply carves out of the estate a legacy, and bequeaths it to an individual capable of taking. Besides, the instrument appoints executors of the testator's estate. If it contained no other provision, this would alone entitle it to probate. Matter of Davis, 105 App. Div. 221, 93 N. Y. Supp. 1004; Id., 182 N. Y. 468, 75 N. E. 530.

The decree appealed from, in so far as it admits to probate the paper dated December 30, 1902, must be reversed, and in all other respects affirmed, without costs to either party as against the other. All concur.[7]

In re PLUMEL'S ESTATE.

(Supreme Court of California, 1907. 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100.)

See ante, p. 215, for a report of the case.

[7] See note to Bryan's Appeal, ante, p. 211. In Sharp v. Wallace, 83 Ky. 584 (1886), the court held that a signed, but unattested, will not in the handwriting of the testator could not be incorporated and validated by an unwitnessed holographic will. But see In re Soher, 78 Cal. 477, 21 Pac. 8 (1889), and In re Plumel, ante, p. 215. In Sawyer v. Sawyer, 52 N. C. 134 (1859), where a holographic will was revoked by the marriage of the testator, and an attempt was made to show an oral revival and republication, the court said (pages 139, 140): "It seems to us clear, as a necessary consequence of the provision of our statute, that a subsisting holograph will cannot be republished, much less can a revoked holographic will be revived and republished, by verbal declarations, 'however explicit and earnest.' If an attested devise cannot be republished, or be revived and republished, except by a written instrument, attested in the manner required by the statute of frauds, in regard to the execution and revocation of devises, it follows by precise analogy that a holograph will cannot be republished, or revived and republished, except by a written instrument attested as required by the statute of frauds, or by a holograph, verified in the manner required by our statute in regard to the execution and revocation of such wills. So our conclusion is that a holograph will revoked by the marriage of the testator can only be revived and republished by a written instrument setting forth his intention, duly attested by two witnesses, or written by the testator himself and found among his valuable papers, or handed to one for safe keeping." See, also, passage from La Rue v. Lee, 63 W. Va. 388, 60 S. E. 388, 390, 14 L. R. A. (N. S.) 968 (1908), quoted in the note to Milam v. Stanley, ante, p. 94.

CROSBIE v. MacDOUAL.

(High Court of Chancery, 1799. 4 Ves. 610.)

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN].[8] When this case was stated, I had no doubt upon it; and the Solicitor General has not been able to succeed in applying that case upon Lord Orford's will [3 Ves. Jr. 402], upon the authority of which alone he rests, to this. I shall give my opinion at present, having very little doubt; and if upon reading that case I see any reason to alter that opinion, I will mention it on Monday.

The testator by his will gives two annuities to Sarah Crosbie. By the fourth codicil he revokes those annuities. Two days after the execution of that codicil, it is said (but that I lay totally out of the case; for I cannot say two days will furnish a presumption that four days or ten days would not furnish) but two days after the execution of the fourth codicil, the testator makes a fifth, expressly calling it a codicil to his will, by which he substitutes one executor for another, and then, in the common way, quite unnecessarily, he declares, that is the only point in which he makes any alteration in the will; for that is the real meaning of those words—that having altered his will in one respect, he means to alter it in no other.[9] The question then is, whether the fourth codicil, so far as it is inconsistent with the will, is revoked in consequence of this reference by the fifth to the will, which indeed is the case of every codicil, which must refer to some will, the last in date, if no express date is mentioned; if there is, that of the particular date expressed.

The case upon Lord Orford's will only determines that a codicil, referring to a former will as the last will, cancels intermediate wills. But the point contended in this case is, that it sets up all the will against a codicil revoking it in part. That case will not by any means bear out that argument. It is perfectly true that, if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it. There is a great distinction between wills and codicils in this respect. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both in the Ecclesiastical Court. The last is the will. From the nature of the instrument, it revokes the other. If the last purports to be the whole will, a complete, substantive will, they do not, I conceive, prove both. Unless there is something to show it was meant to be coupled with another instrument, it is not taken to be a codicil. But if it does purport to be coupled with another instrument, it is as much

[8] The statement of facts is omitted.

[9] The words of the fifth codicil here referred to constituted the concluding sentence of the codicil and were: "And I do hereby confirm my said will in all other respects."

a part of that instrument as if it was written upon the same paper.[10] Many absurdities would follow from the contrary construction. Suppose the testator had by his will given a legacy of £200, and by a codicil had given the legatee £100 instead of the £200, and then should make another codicil, of this sort, merely changing an executor, and ratifying and confirming his will in all other respects. Is the legatee to have both the £200 and the £100? That must be contended.

The true rule upon the subject appears to me to be as I have stated. The Solicitor General confesses that, if it was not for the case of Lord Walpole v. Lord Orford [supra], he should scarcely have been able to argue it; but he thinks that case affords him a sufficient ground. It differs in this essential point. There was no question in that case upon a will and a codicil. The question was upon two inconsistent wills—one made in 1752, the other in 1756. The second has destroyed the first, unless the testator thought fit to revive it. By a codicil in 1776, he expressly declares it to be a codicil to his last will and testament, dated the 25th of November, 1752. That was held to cancel the intermediate will. All that the courts of law, first the Court of Common Pleas, and afterwards the Court of King's Bench, determined, was, that evidence could not be admitted to prove the mistake, and that the testator did not mean to refer to the will, to which the codicil did expressly refer. It was said that it really arose from the mistake of the person employed to draw the codicil, who took the wrong will. Both the courts of law were of opinion they could not receive evidence of that; as the testator had solemnly declared, the will of 1752 was his last existing will.[11] It would not at all affect the case of any codicil made as an appendix to either of his two wills. If the will had dropped, perhaps a codicil, professedly a codicil to that will, would have dropped with it. That might have been a nice question—whether a codicil, which in words referred only to the will of 1756, would not have fallen with that will. I will look into that case before Monday; and if I see any reason to alter my opinion, I will mention it.

Declare, that the annuities of £200 and £300, given by the will to Sarah Crosbie, were and remain revoked by the fourth codicil

The case was not mentioned again.

[10] That a codicil, to be effective, need not be physically attached to the will, see 14 Am. & Eng. Ann. Cas. 472, note.

[11] In In the Goods of Lady Isabella Gordon, [1892] P. 228, where by mistake a codicil executed in 1891 stated that it was a codicil to a will of 1887, which was revoked by a will of 1889, the will of 1889, and the codicil of 1891 with the reference to the will of 1887 omitted, were admitted to probate. See, also, In the goods of Alfred Reade, [1902] P. 75.

GREEN v. TRIBE.

(High Court of Justice, Chancery Division, 1878. 9 Ch. D. 231.)

Elizabeth Love, by her will dated the 9th of February, 1872, gave to trustees the sum of £1,000 upon trust to invest the same, and to pay the income to her niece, Ellen Love, during her life, and after her decease upon trust for her children as therein mentioned. And the testatrix devised her residuary real estate to trustees on trust for sale, and gave to the same trustees the residue of her personal estate, and the proceeds of the sale of her said real estate, upon trust as to two sixteenths thereof to pay the same unto her nephew Stephen Love, and as to two other sixteenths thereof upon such trusts for the benefit of her niece Ellen Love and her issue as were therein declared of the said sum of £1,000 bequeathed for her benefit.

Elizabeth Love made a codicil dated the 27th of August, 1872, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of Filstone, in the parish of Shoreham, in the county of Kent, spinster, which will bears date the 9th of February, 1872. I do hereby revoke and make void every gift, devise, appointment, and bequest made by me in and by my said will to or in favor of my niece Ellen Love and my nephew Stephen Love respectively. I confirm my said will in all other respects."

Elizabeth Love made a second codicil dated the 14th of April, 1873, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of the parish of Shoreham, in the county of Kent, spinster. Whereas since the date of my said will I have purchased two messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 5 and 6, Camden Villa, London Road, in the parish of Sevenoaks, in the county of Kent. And I have contracted to purchase two other messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 9 and 10 Granville Road, in the said parish of Sevenoaks, but the purchase whereof has not yet been completed. Now I devise the said four messuages and premises respectively, with the appurtenances and all other the real estate, if any, which I have acquired or contracted to purchase since the date of my said will unto my brother Samuel Love, my brother-in-law John Tribe, my nephew Frank Green, and William Francis Holcroft, the trustees and the executors named in my said will, and to their heirs, to, upon, and for the several uses, trusts, intents, and purposes in my said will expressed and contained of and concerning my residuary real estate (other than the messuage, cottage, and premises thereby devised to my said brother Samuel Love for his life as therein mentioned). And I declare that the produce of the sales of the messuages and hereditaments hereby devised as aforesaid shall fall into and form part of my residuary and personal estate thereby bequeathed and shall be divided in the same proportions and for the benefit of

the same parties as in my will is expressed and declared of and concerning my said residuary personal estate, and that each share respectively shall be subject to the same trusts, restrictions, and limitations over in all respects as the original share thereby bequeathed, and as if the share hereby bequeathed had actually formed part of my said residuary personal estate disposed of by my said will. In other respects I confirm my said will."

Elizabeth Love died in September, 1873, and this action was brought for the administration of her estate. Two of the questions argued on the hearing were, whether the second codicil revoked the first codicil; and if not, whether the messuages comprised in the second codicil would go according to the terms of the residuary devise in the will alone, in which case Stephen Love and Ellen Love would take each two sixteenths, or would go according to the will and first codicil together, in which case Stephen Love and Ellen Love would take nothing.

Fry, J. It appears from the statements made by the plaintiff, which are not disputed by the defendants, that the purchase, a recital of which is contained in the second codicil, had been made by the testatrix after the 9th of February, 1872, the date of her original will, but before the 27th of August, 1872, the date of her first codicil. This being so, it appears to me that the second codicil must be read as if the last will and testament there referred to had been described by its proper date, and as if the testatrix had declared that the second codicil was a codicil to her last will and testament of the 9th of February, 1872.

Upon this state of facts two questions have been raised before me, First, did the second codicil revoke the first codicil, and revive the original will in all its dispositions, and consequently restore Ellen Love and Stephen Love to the position of legatees under that will? Secondly, if this were not the case, was the real estate specifically mentioned in the second codicil devised upon the terms of the original will unaffected by the second codicil?

Both these questions must be determined by the answer to a third question, which is this: Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil?

The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word "will" abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been

confirmed. "The will of a man," said Lord Penzance in Lemage v. Goodban, Law Rep. 1 P. & M. 57, "is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the statute." On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider is, whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force—in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer.

The first to which I desire to refer is the case of Crosbie v. Macdoual, 4 Ves. 610. There the testator made a will and five codicils, and a question arose as to the effect of the fifth codicil upon the fourth codicil, by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in the place of another, was silent as to all antecedent codicils, and concluded by confirming the testator's said will in all other respects. The then Master of the Rolls held that the fourth codicil was not revoked by the fifth. This decision rested upon two propositions. The first, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it. The second, that the ratification of a will described by its date is a ratification of the will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil.

In the case of Smith v. Cunningham, 1 Add. 448, a similar question arose. There the testator made first a will, then five codicils in succession, then a sixth codicil, by which he confirmed and republished his will and two codicils describing the will, and two codicils by the dates which they respectively bore, and it was held that the sixth codicil did not effect a revocation of the three unmentioned codicils. The court held, in the first place, that the intention to revoke must be clear and unequivocal; in the second place, that no clear inference in favor of the revocation arose from the language of the sixth codicil; and, thirdly, that, looking at all the circumstances to ascertain the intention of the testator as to what instruments should operate as and compose his last will, as the Court of Probate was in the habit of doing (Greenough v. Martin, 2 Add. 239), there was no intention to revoke.

In In the Goods of De la Saussaye, Law Rep. 3 P. & M. 42, a case which came before Sir James Hannen in the year 1873, a similar point arose. The testator there first made a will, he then made three codicils in Spain, he then made a codicil in England by which he revoked certain dispositions contained in his will, which he described as executed in London on the 12th of March, 1869, and concluded by confirming the dispositions contained in his will of the 12th of March,

1869, in whatever did not clash or interfere with the contents of that codicil. The question arose whether the express reference to the will of the 12th of March, 1869, implied an intention on the part of the testator to revoke his Spanish codicils. The court held that it did not, on the ground that those codicils were to be deemed parts of the will, and were themselves confirmed by the ratification of the will of which they were modifications.

In each of the cases which I have hitherto considered, as well as in the case before me, the earlier codicil in question had a force of its own. It must prevail unless it be revoked by the subsequent codicil. But there is a class of cases closely akin to those I have been considering, but different in this respect, that in them the earlier codicil has no proper vigor of its own, but derives its force, if at all, from the later codicil. The cases of the latter class are not uniform. First in point of date comes Gordon v. Lord Reay, 5 Sim. 274; there the testator made a charge on real estate by an unattested codicil, and by a subsequent codicil referred to his will by its date, and confirmed his will; and the Vice-Chancellor of England held that the first codicil was a part of the will, that the second codicil was a republication of the will, and consequently of the first codicil which was a part of it. In the case of Aaron v. Aaron, 3 De G. & Sm. 475, the testator duly made a will; he then made a codicil not duly attested varying the dispositions of his will; he then duly made a second codicil by which he recited that he had duly made and executed a will and codicil, describing them by their respective dates, and then, after certain modifications in his will, ratified and confirmed his "said will" in all other particulars thereof, saying nothing as to the ratification of his first codicil. The court held that the intention of the second codicil, as collected from the whole of it, was to confirm the first codicil so as to give effect to it as if it had been duly attested by three witnesses. The recital of the first codicil as having been duly executed was a strong circumstance in this decision.

So far the current of authority seems to run smoothly. But in the recent case of Burton v. Newbery, 1 Ch. D. 234, the present Master of the Rolls took a different view. There the testator made a will before the Wills Act, under which A. and B. took shares of the proceeds of his real estates. By a codicil made after the Wills Act, he devised subsequently acquired realty on the trusts of his will. This codicil was attested by A. and B., who consequently were incapable of taking their shares under the codicil. By a second codicil, described as a codicil to his will dated the 1st of April, 1839, he gave a pecuniary legacy, and said nothing as to his first codicil. In this state of facts the Master of the Rolls held that the second codicil did not operate as a republication of the first. The only reference, he said, was to a will bearing date a certain day, that is, as I understand it, to a described instrument which excludes instruments of subsequent dates. It appears to me that the Master of the Rolls intended by this judg-

ment to decide only that where recourse is had to a subsequent codicil to give vigor to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil. Accordingly, I find him dissenting from the case of Gordon v. Lord Reay [supra], but referring without disapproval to the earlier case of Crosbie v. Macdoual [supra].

The two classes of cases differ essentially. In the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail. In the one class the question is, does the later codicil revoke the earlier and operative one; in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application. Doe v. Hicks, 8 Bing. 475; Farrer v. St. Catherine's College, Law Rep. 16 Eq. 19.

I conclude, therefore, that the decision of the Master of the Rolls in Burton v. Newbery does not touch the case before me, and was not intended to touch the class of cases to which it belongs.

The case of Crosbie v. Macdoual and the cases which have followed it appear to me to be right in principle. The character of a codicil is very peculiar. Its nature is not substantive but adjective. It is, as Mr. Justice Blackstone describes it (2 Bl. Com. [Kerr's Ed.] 450), "a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament." A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date, does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils.

This peculiar character of codicils is well illustrated by two cases in the ecclesiastical courts. In the case of Wade v. Nazer, 1 Rob. Ecc. 627, the testator executed first a will and then a codicil and then re-executed his will, and it was held that the re-executed will took effect subject to the codicil, on the ground that it was a part of the will which was so re-executed. In the case of Upfill v. Marshall, 3 Curt. 636, the testator made a will, then a codicil, altering certain of its dispositions, and then republished his will. It was held that the codicil was not revoked by the republication of the original will, and that for the same reason the codicil was a part of the republished will.

One other argument remains for consideration. According to the construction which I place upon the second codicil, the property expressed to be devised by it passed in sixteen shares in accordance with the will of the testator. I cannot yield to the argument pressed upon me that even if the first codicil was not revoked, the second codicil passed the after-acquired property on the trusts of the original will.

If I am right in thus holding, the codicil operated nothing, unless it be held to have restored the original will by revoking the first codicil, in which case it would have had the very material operation of restoring Ellen Love and Stephen Love to their position of legatees. The codicil ought, it may be suggested, to be construed so as to have some effect, and there being no other effect for it, it ought to be so construed as to revoke the first codicil, and thereby admit Ellen Love and Stephen Love to the benefit of the original dispositions intended for them. This argument ought not, I think, to prevail, because it appears to me to be at variance with the expressed intentions of the testatrix. She recites in the codicil the circumstance which induced her to execute it, namely, the purchase of property since the date of her will, and the contract for purchase of other properties. She appears to have thought that this rendered it desirable to execute a codicil to her will, but it is impossible to suppose that if the real object had been to restore Ellen Love and Stephen Love to their original position as legatees, such an intention would not have been hinted at in the recitals which are introduced into the second codicil for the very purpose of explaining its object; I notice the argument, therefore, only for the purpose of rejecting it.

The result is, that in my judgment the second codicil was absolutely inoperative. The will and first codicil must take effect with regard to the whole of the real estate of which the testatrix died possessed, whether acquired before or after the date of her original will.[12]

In re CAMPBELL.

(Court of Appeals of New York, 1902. 170 N. Y. 84, 62 N. E. 1070.)

GRAY, J. This was a proceeding for the probate of a will and of a codicil of Ellen Campbell, deceased, and it therein appeared that she

[12] See McLeod v. McNab, [1891] A. C. 471, where it was held that, while a reference in a codicil to a will by date was not sufficient in itself to exclude an intermediate codicil which revoked a particular bequest in the will, yet in the case at bar the reference would do that, as the circumstances and the other language in the codicil showed that the testator did intend to exclude that intermediate codicil.

In Burton v. Newbery, 1 Ch. D. 235 (1875), gifts were made in a first codicil to two of the three attesting witnesses and to others. Later a second codicil was duly executed, which referred to the will by date, but did not mention the first codicil. While the first codicil was not wholly invalid, because the Wills Act made only the gifts to the witnesses void, it was held, however, that the void gifts under the first codicil were not validated by the second codicil, since the first codicil was not republished by the second. But quære? See the comment on Burton v. Newbery in the principal case.

In Anderson v. Anderson, L. R. 13 Eq. Cas. 381 (1872), the will made a gift to the husband of a witness. A codicil was subsequently made, duly attested by other witnesses, not referring specifically to the gift just mentioned, but changing the terms of a gift to another person and confirming the will in other respects. It was held that the codicil republished the will, and made valid the gift to the husband of the witness to the will.

had executed, at different times, and there were existent, two wills and a codicil. On July 6, 1897, one will was executed; on July 19, 1899, another will was executed and on December 7, 1900, an instrument was executed by the testatrix, which declared itself to be a "codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897." The will of 1899 modified, or changed, the provisions of the will of July, 1897, in respects relating to legacies given and in giving new legacies. Each of these wills was executed with the requisite statutory formalities and contained the usual revocation clause. The codicil of 1900 modified some provisions of the will of 1897, expressly revoked others and added some legacies. It made no reference to the will of 1899. The will of 1897 and the codicil thereto of 1900 were admitted by the surrogate to probate, as constituting the last will and testament of the deceased; while the will of 1899 was refused probate, as having been revoked. The conclusions of the surrogate in those respects were unanimously affirmed by the Appellate Division and the Home for Aged Men, a legatee under the will of 1899, appeals to this court from the decision below.

Although it is found as a fact by the learned surrogate that the testatrix, by the execution of the codicil in 1900, republished her will of July, 1897; nevertheless, the finding is, in its nature, a legal conclusion from the facts and the question of law is in the case. It is contended, on the part of the appellant, that the statutory provisions with respect to the destruction, cancellation and revocation of a will, are applicable to the present case. 1 R. S. c. 6, tit. 1, art. 3, § 53. They, clearly, are not. Whether the earlier will was revived by the destruction of a later will is not the question; nor does the validity of testatrix's action with respect to the prior will depend upon verbal declarations, as in the Matter of Stickney, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246.

The question is whether the execution by the testatrix of the codicil revived and republished the earlier will of 1897, a completely executed and existent instrument, so that the two instruments, together, constituted the final testamentary disposition of her estate. That such is, generally, the effect of a codicil and that the will thereby republished speaks from the date of the codicil is a proposition settled upon authority. Van Cortlandt v. Kip, 1 Hill, 590; Brown v. Clark, 77 N. Y. 369; Matter of Conway, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796. That there intervenes, between the will referred to in the codicil and the codicil itself, another will, executed by the testatrix and, in terms, revoking other wills, does not affect the result; because the codicil to the earlier will implies its existence and effects, impliedly, if not expressly, the revocation of the intermediate will.

Of course, there can be no question that the purpose of the testatrix was to re-establish her earlier will; for the title given to the instrument, its subject-matter and the circumstances of its preparation, with the will before her, clearly indicate it. Equally clear, too, should it be

that the testatrix purposed the abandonment of her second will. There is no reason in the law why her manifest purpose should not be given effect.

The object of the Statute of Wills is to effectuate that which is proved to be the last will of a deceased person. To that end, it prescribes certain formalities of execution, whereby the possibility of imposition, or of fraud, is minimized. When a codicil is executed with those formalities, it is a final testamentary disposition and the will, to which it is shown to be the codicil, if itself an existent and a completed instrument, according to the statute, is taken up and incorporated; so that the two taken together are deemed to, and necessarily do, express the final testamentary intentions. In such a case, it must, logically and manifestly, follow that any other will, or codicil, prior in date to the codicil in probate, is revoked and the presence of express words to that effect, in the codicil, is unnecessary. See 1 Williams on Executors (6th Am. Ed.) pp. 251, 252; 1 Jarm. on Wills (5th Am. Ed.) *114–*191; Brown v. Clark, supra; In the Goods of Reynolds, L. R. 3 Probate & Divorce, 35.

In Brown v. Clark, a married woman executed a codicil, which, in terms, referred to and republished a will executed by her before her marriage, and it was held that it effected a re-establishment and a valid publication of the will, which had been revoked as the effect, under the statute, of the marriage. In the English case cited, In the Goods of Reynolds, a will had been executed in 1866, and a codicil to it in 1871. Later, in 1871, another will was executed, revoking all previous wills and codicils. In 1872, a codicil was executed, entitled: "This is a codicil to the will of B. R., dated May, 1866." Probate was decreed of the will of 1866 and of the codicil of 1872, by which it had been revived. The codicil of May, 1871, was held not to be revived, as there was nothing to show such an intention.

I think the judgment below is right and that it should be affirmed, with costs to the respondents, the Albany Historical and Art Society and the executors, to be paid out of the estate.

Judgment affirmed.*

IZARD v. HURST.

(High Court of Chancery, 1697. 2 Freem. C. C. 224.)

The defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his eldest daughter to the plaintiff, and gave her £700 portion; after that he makes a codicil and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was,

* See Neff's Appeal, 48 Pa. 501 (1865). On the correction of a mistaken reference to a prior will, see note 11 to Crosbie v. MacDoual, ante, pp. 352, 353.

whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy?

And held [by Sir JOHN TREVOR, M. R.] that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage or otherwise had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.[13]

[13] See Tanton v. Keller, 167 Ill. 129, 47 N. E. 376 (1897); Langdon v. Astor's Ex'rs, 16 N. Y. 9 (1857). Compare Trustees v. Tufts, 151 Mass. 76, 23 N. E. 1007, 7 L. R. A. 390 (1890).

"It has been argued that the codicil of the 23d of June, 1818, confirming the will, makes the will speak as of the date of the codicil, and therefore revives the legacy, if it had been adeemed by the settlement, and at all events is evidence of an intention that the legacy should take effect. It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-acquired lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time: and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied." Lord Cottenham, in Powys v. Mansfield, 3 Myl. & Cr. 359, 375, 376 (1837).

In Hubbard v. Hubbard, 198 Ill. 621, 64 N. E. 1038 (1902), a codicil confirming a will was held not to restore a bequest in the will stricken out by the testator prior to the execution of the codicil. On the effect of republication on lapsed legacies, see 1 Jarman on Wills (5th Am. Ed.) *200.

CURATIVE EFFECT OF A CODICIL.—While an adeemed gift will not be renewed by mere republication of the will by a codicil, a will bad for want of testamentary capacity may be rendered good by a codicil republishing it.

"It is clear, from this evidence, that the issue made up on the appeal from the ordinary involved the validity of the codicil, as well as the will. * * * This is manifest from the consideration that, although the will, when executed, might be bad, or the testator might be non compos mentis, or under duress or undue influence, at its execution, yet if he was sane and free from duress or undue influence when he executed the codicil, that would be a republication and confirmation of the will, and would free it from the objection to which it was liable at its execution." Evans, J., in Farr v. O'Neall, 1 Rich. Law (S. C.) 89, 89 (1844). See Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150 (1857). If a will be vitiated by undue influence, nothing short of republication will validate it. Lamb v. Girtman, 26 Ga. 625 (1859); Chaddick v. Haley, 81 Tex. 617, 17 S. W. 233 (1891). But where a testator retains a will unrevoked, when he is free from undue influence and has ample opportunity to revoke it, a presumption that there was no undue influence in its execution may be indulged. Kelly v. Thewles, 2 Ir. Ch. 510 (1852). A duly executed codicil, of course, covers other defects in jurisdictions recognizing the doctrine of incorporation by reference. In Walton's Estate, 194 Pa. 528, 533, 45 Atl. 426, 428 (1900), for instance, the court said: "There was a grave irregularity in the execution of the first codicil. One of the subscribing witnesses did not attest it in the presence of the testatrix. But there was a subsequent codicil, properly executed and attested, and that codicil contained an express republication of both the will and the first codicil, and the latter instrument was thereby validated." But the New York and the Connecticut rule must be borne in mind. See In re Emmons' Will, ante, p. 349.

GURNEY v. GURNEY.

(High Court of Chancery, 1855. 3 Drew. Ch. 208.)

Thomas Gurney made his will on the 6th April, 1853, and by it, among other legacies, he gave £100 to Richard Fry.

He gave also a share of his residue to W. G. Temple.

Neither Fry nor Temple attested the will. The testator made two codicils, both of which were attested by Fry and Temple.

By the first codicil the testator revoked certain bequests, the effect of which was to swell the residue.

Among other questions on the will this question arose: Whether the legacy to Fry was avoided by his attesting the codicils; and whether the title of Temple to a share of the residue was affected by his attesting the codicils?

THE VICE CHANCELLOR [Sir R. T. KINDERSLEY], after stating the facts and referring to the Wills Act, proceeded:

Now the word "thereby," referring as it does to the words preceding, must be construed to mean by the same testamentary instrument which is attested; and that does not apply to the case where a legatee has not attested the instrument by which he takes his legacy, but only where he has attested the same instrument under which he takes. I think, therefore, that the legacy to Fry is not void under the statute. Then there is another case of the same description relating to another person who witnessed one of the codicils, viz., Temple. The testator by his will gave his residue in equal shares among his brothers and sisters for their lives, and on their deaths to go among their respective children; and Temple, who attested the codicil, was a child of one of the sisters, and under the will he was therefore entitled to a share of the residuary estate. By the codicil the testator revoked a legacy, the effect of which was to increase the shares of those who were entitled to the residue, and Temple, who was benefited by this increase, attested the codicil. The question is, what is the effect of the statute on this state of things?

It appears to me that I am not to extend the operation of the statute, but to look at what is the fair interpretation of the words; and the question is whether, by the codicil so attested, any beneficial devise, legacy, estate, interest, gift or appointment is given or made to the legatee who attested it. I think that the effect of the codicil does not amount to any beneficial devise, legacy, estate, interest, gift or appointment given or made to Temple, and therefore that Temple's case is not within the statute.[14]

[14] See Tempest v. Tempest, 2 K. & J. 635 (1856). Compare Anderson v. Anderson, L. R. 13 Eq. Cas. 381 (1872).

In re McCAULEY'S ESTATE.

Appeal of STATE.

(Supreme Court of California, 1903. 138 Cal. 432, 71 Pac. 512.)

CHIPMAN, C. Jennie C. McCauley duly executed a will on February 12, 1900, in which she, among others, made several bequests to charitable institutions. On March 16, 1900, she duly executed a codicil to this will. She died April 14, 1900, 28 days after the execution of the codicil. The state, by the attorney general, filed objections and contest to the petition for final distribution, so far as concerned the charitable bequests, and prayed that they be adjudged void, and that they be distributed to the state for the support of the common schools. The trial court adjudged the said bequests to be valid, and decreed distribution accordingly. The state appeals from the decree.

The codicil did not attempt to change any of the charitable bequests, or any of the general provisions of the will, but related solely to specific bequests and devises to certain individual legatees. It stated that "the foregoing codicil * * * was, at the date hereof, * * * signed, sealed, and published as, and declared to be, together with the will set forth on the preceding pages, to be her last will and testament," etc.

Section 1313, Civ. Code, provides as follows: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator." Section 1287 of the same Code reads as follows: "The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil." The testatrix left "no relatives or next of kin," as she declared in her will, and, as seems to be conceded by respondents, the bequests in question will escheat if, as to such bequests, the will is invalid.

Appellant's contention is "that the effect of the republication of the will by the codicil of March 16, 1900, and the testatrix dying in less than 30 days thereafter, is to invalidate all the bequests to charity contained in the will." Appellant cites numerous cases to the effect that the codicil brings the will to it, and makes it the will from the date of the codicil. Some of the cases speak of the codicil as a republication of the whole will at the date of the codicil. Still others hold that the codicil operates as a republication of the will, the effect of which is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date, and taking effect at the same time. Payne v. Payne, 18 Cal. 292, at page 302, and In re Ladd, 94 Cal. 670, 30 Pac. 99, are cited as in line with the authorities elsewhere holding as above stated.

In the Ladd Case it was said that "the execution of the codicil had the effect 'to republish the will as modified by the codicil' (Civ. Code, § 1287) as of the date of the codicil (Payne v. Payne, 18 Cal. 302)." Again: "The effect of its execution was to republish the entire will, and not merely the clause so modified, 'as if the testator had inserted in the codicil all the words of the will.'" Doe v. Walker, 12 Mees. & W. 597. In giving construction to the will it was said that "the whole of the original will and the codicil are to be construed as a single instrument executed at the date of the codicil, and of which all the parts are to be construed, 'so as, if possible, to form one consistent whole.'" Civ. Code, § 1321. But it was also said: "A codicil is never construed to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil. 1 Jarman on Wills, 176. 'The dispositions made by a will are not to be disturbed by a codicil further than is absolutely necessary in order to give it effect, and a clear disposition made by the will is not revoked by a doubtful expression or inconsistent disposition in a codicil.' Kane v. Astor's Ex'rs, 5 Sandf. (N. Y.) 533. 'The different parts of a will, or of a will and codicil, shall be reconciled if possible; and, where a bequest has once been made, it shall not be revoked, unless no other construction can fairly be put upon the language used by the testator. Colt v. Colt, 32 Conn. 446. See, also, Wetmore v. Parker, 52 N. Y. 462; Johns Hopkins University v. Pinckney, 55 Md. 365.'"

No one for a moment can suppose that the codicil in the present will was intended to disturb the bequests made in the original will in aid of the charities named. These bequests were not only left untouched by the codicil, but the testatrix declared that "the foregoing codicil * * * was * * * published as, and declared to be, together with the will set forth on the preceding pages, to be her last will." That the testatrix intended her bequests first made in the will to stand unaffected by the codicil can admit of no doubt, and yet we are asked to give such construction to section 1287 as shall destroy a large number of her bequests, and practically nullify the testatrix's clearly expressed intention with respect to them. We have seen that no such construction can be given to the codicil itself. Can we—or, rather, are we compelled to—so construe the statute as to destroy these bequests, and thus thwart the design of the testator?

Section 1292 provides that: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will, or other writing of the testator, declaring such revocation or alteration; * * * or, (2) by being * * * destroyed, with the intent and for the purpose of revoking. * * *" And section 1317 provides that: "A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible."

In construing section 1287, we must keep in view the various sections relating to the subject of wills, and must so construe that section as to preserve the letter and spirit of all the provisions of the statute so far as possible. The section should have such construction, if it is possible in reason to do so, as will carry out the known intention of the testator. Section 1313 invalidates the charitable bequest unless the will is "duly executed at least thirty days before the decease of the testator." When the will is once "duly executed," it remains the will of the testator until revoked. This may be done as prescribed in section 1292.

A codicil does not disturb the will except so far as it is inconsistent with it, or in terms or by necessary intendment revokes it. As was said in the Ladd Case: "Where a bequest has once been made, it shall not be revoked unless no other construction can fairly be put upon the language used by the testator." For some purposes, no doubt, the will speaks from the date of the codicil, but this is true only so far as the codicil requires that it should so speak. It is entirely consistent with the statute and the codicil now before us that the contested bequests should stand as made of the date of the will. The testatrix declared the will as first executed to be her will, except as to the changes made in the codicil, and the statute (section 1287) says that the effect of the codicil is "to republish the will, as modified by the codicil," and not otherwise. To construe the statute, as is contended for by appellant, is to leave a large part of the estate undisposed of, as well as to defeat the object of the testatrix. We do not think it should be given any such construction.

A statute of Pennsylvania, referred to as the act of April 26, 1855 (P. L. 332), provided: "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic or to any person in trust for religious or charitable uses, except the same be done by deed or will attested by two credible witnesses, at least one calendar month before the decease of the testator or alienor." In 1879 an act was passed in that state by which it was provided "that every will shall be construed with reference to the real or personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator."

In Carl's Appeal, 106 Pa. 635, the will was executed September 6, 1877. A codicil was executed March 14, 1881, and the testator died April 4, 1881. It was contended that the charitable bequests of the will were void. In construing the act of 1879 with that of 1855, the orphans' court, Gibson, J., speaking of the effect of the republication of a will by a codicil, said: "There is a class of cases about which there can be no contention; such as Neff's Appeal, 48 Pa 501, in which the question was whether the codicil revoked a second will and republished an earlier will on which it was written. * * * But we find that in all other cases, since the modern statutes of wills, which

may arise out of the execution of a codicil, questions regarding the intention of the testator are involved to such an extent as to qualify the rule invoked here materially"—citing instances, in one of which (Alsop's Appeal, 9 Pa. 374) this distinction is shown: "That though, for some purposes, a will and codicil are to be regarded as making but one testament, they will not be considered as a single instrument where a manifest intention requires otherwise."

Other cases are cited to show, for example, that the first will would have been revoked by the second will, but for the codicil which gave it life; "and yet it did not affect the validity of the charitable bequests in the first will. This could only be on the ground of its being a separate instrument." Hamilton's Estate, 74 Pa. 69, and Bradish v. McClellan, 100 Pa. 607; Neff's Appeal, supra. The learned justice concludes: "The question raised here as to the period from which this will speaks, based upon the doctrine of republication by a codicil, would make void the charitable bequest given by the original will, contrary to the intention of the testatrix. The very act of republication ipso facto would make null and void that which republication by intendment of law reaffirms. I think the validity of the residuary bequest * * * is not affected in any way by the codicil, and that it does not bring the bequest within the prohibition of the act of 1855."

On appeal the views of the orphans' court were fully indorsed. In further support of the decree it was said: "The fault of the opposing counsel lies in confounding a legal fiction with a physical fact. Of course, all wills must speak as of the time of the testator's death. It is a pure legal fiction that they were executed at that time. The fact of actual execution remains, and is entirely unaffected by the fiction. Whenever the factum is material, of its own force, in determining results, it will be treated as of the date of its actual occurrence."

Our statute (section 1287, Civ. Code) certainly does not, by its terms, compel the construction urged by the attorney general. To give to it such construction we must import into the statute a legal fiction. This we might do in some cases, but not where it would result in defeating the clearly expressed intention of the testatrix.

The judgment should be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.[15]

[15] See Sloan's Appeal, Watt's Estate, 168 Pa. 422, 32 Atl. 42, 47 Am. St. Rep. 889 (1895); In re Moore (Long v. Moore), [1907] 1 Ir. R. 315. In the latter case the court, by Barton, J., said: "Republication gives to the will a fresh starting point, but it does not erase the old date. Nor does it, in my opinion, falsify the fact that the will contained a particular devise and was executed at a particular time. * * * In short, the aim of the court has always been to apply the rules as to republication with good sense and discrimination, for the purpose of as far as possible effectuating *up to date* the intentions of testators. But the real date and the real facts connected with the original execution of the will are not altered or falsified." Pages 318, 320.

SECTION 3.—REVIVAL

PICKENS v. DAVIS.

Supreme Judicial Court of Massachusetts, 1883. 134 Mass. 252, 45 Am. Rep. 322.)

Appeal from a decree of the probate court, allowing the will of Mary Davis.

C. ALLEN, J. The two questions in this case are, first, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this commonwealth. In Reid v. Borland, 14 Mass. 208, the second will was invalid, for want of due attestation. In Laughton v. Atkins, 1 Pick. 535, the second will was adjudged to be null and void, as having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has often been said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Wms. on Executors (5th Am. Ed.) 154–156, where the authorities are cited. The doctrine of the ecclesiastical courts was thus stated in 1824 in Usticke v. Bawden, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a later, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." See, also, Moore v. Moore, 1 Phillim. 406; Wilson v. Wilson, 3 Phillim. 543, 554; Hooton v. Head, 3 Phillim. 26; Kirkcudbright v. Kirkcudbright, 1 Hagg. Ecc. 325; Welch v. Phillips, 1 Moore P. C. 299. In Powell on Dev. (Ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that, "if a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that

the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (page 529, note).

While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English Statute of Wills was passed (St. 7 Wm. IV. & 1 Vict. c. 26), section 22 of which provided that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation, of a former will, such former will would not be revived by the cancellation or destruction of the later one. Major v. Williams, 3 Curt. Ecc. 432; James v. Cohen, 3 Curt. Ecc. 770, 782; Brown v. Brown, 8 El. & Bl. 876; Dickinson v. Swatman, 30 L. J. (N. S.) P. & M. 84; Wood v. Wood, L. R. 1 P. & D. 309. In order to have the effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. Cutto v. Gilbert, 9 Moore, P. C. 131. See, also, Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170.

In the United States, there is a like discrepancy in the decisions in different states, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in James v. Marvin, 3 Conn. 576, where it was held that the revocatory clause in the second will, proprio vigore, operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that state, in 1857, in Simmons v. Simmons, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in Colvin v. Warford, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, prima facie, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In Harwell v. Lively, 30 Ga. 315, 76 Am. Dec. 649, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent sugges-

tion: "It must be conceded there is much law adverse to the doctrine. * * * Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late act, is it not the dictate of wisdom to begin in this state where they have ended in England? We think so." See, also, Barksdale v. Hopkins, 23 Ga. 332. The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. Bohanon v. Walcot, 1 How. (Miss.) 336, 29 Am. Dec. 631; Scott v. Fink, 45 Mich. 241, 7 N. W. 799.

It is to be observed, that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246, 7 N. W. 799; 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that state, if the question had been directly presented. Lawson v. Morrison, 2 Dall. 286, 290, 1 L. Ed. 384, 1 Am. Dec. 288; Boudinot v. Bradford, 2 Yeates, 170, s. c. 2 Dall. 266, 1 L. Ed. 375; Flintham v. Bradford, 10 Pa. 82, 85, 92.

On the other hand, in Taylor v. Taylor, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by Randall v. Beatty, 31 N. J. Eq. 643, and cases there cited.

In various states of the Union statutes have been enacted substantially to the same effect as the English statute above cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, and Virginia, and probably in other states. Concerning these statutes of New York, it is said in 4 Kent, Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this state, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property

is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true.

It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of cancelling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the statute of England, and of Virginia, and perhaps of other states, such revival cannot be proved in this manner. Major v. Williams, and Dickinson v. Swatman, above cited; Rudisill v. Rodes, 29 Grat. (Va.) 147. But this results from the express provision of the statute.

In the present case, there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant

to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous, or subsequent, may be proved in evidence.

In the great case of Sugden v. St. Leonards, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of Keen v. Keen, L. R. 3 P. & D. 105, is to the same effect. See, also, Gould v. Lakes, 6 P. D. 1; Doe v. Allen, 12 A. & E. 451; Usticke v. Bawden, 2 Add. Ecc. 123; Welch v. Phillips, 1 Moore, P. C. 299; Whiteley v. King, 10 Jur. (N. S.) 1079; Re Johnson's Will, 40 Conn. 587; Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460; Patterson v. Hickey, 32 Ga. 156; 1 Jarm. Wills (5th Am. Ed. by Bigelow), 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited in Collagan v. Burns, 57 Me. 449, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the probate court reversed.[16]

STETSON et al. v. STETSON et al.

(Supreme Court of Illinois, 1903. 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258.)

MAGRUDER, C. J.[17] * * * The sole ground upon which the validity of the will of December 3, 1897, duly admitted to probate, is contested, is that a subsequent will was executed by the testator, con-

[16] On revival by the revocation of the revoking will, see 37 L. R. A. 575, note; 14 L. R. A. (N. S.) 937, note; 4 Am. & Eng. Ann. Cas. 313, note; 13 Prob. Rep. Ann. 28, note.

[17] The statement of facts is omitted, and part only of the opinion is given.

taining a clause revoking all former wills. Such subsequent will, alleged to have been executed between September 1, 1898, and the death of the testator, has been lost or destroyed; or, at any rate, it was not found in the possession of the testator, and has never been produced, either for probate in the county court, or otherwise.

The question presented for our consideration, and raised by the refusal of the court below to hold as law the propositions submitted by the appellants, and by the rulings of the court below in the admission and exclusion of evidence, is twofold in its character, and, as formulated in the briefs of counsel on both sides, may be thus stated: If the second will made by Jesse Stetson contained an express clause of revocation, did such clause operate at once, and of its own force, to immediately revoke and annul the first will, made on December 3, 1897; and did the loss or destruction of the second will, containing such clause or revocation, even though such loss or destruction was the act of the testator himself, operate to revive the former will dated December 3, 1897? Perhaps in no branch of the law is there more conflict among the decisions of the courts than in that which relates to the revocation of a former will by a subsequent will, and to the effect of the cancellation of a subsequent revoking will in reference to the revival or nonrevival thereby of the first will.

There are cases which hold—and many of the text-books indorse and sustain the holdings of such cases—that where a person, having made a will, afterwards makes another will, containing a clause expressly revoking all former wills, and afterwards destroys the second will, and dies, leaving the former will uncanceled, the revoking clause operates instantaneously to effect a revocation; and that, consequently, the destruction of the second will does not revive the former one. 1 Underhill on Wills, § 266; Schouler on Wills, §§ 412–418; James v. Marvin, 3 Conn. 577; Scott v. Fink, 45 Mich. 241, 7 N. W. 799; Cheever v. North, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; Hawes v. Nicholas, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863; Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322; Barksdale v. Hopkins, 23 Ga. 332.

Many of the cases which thus hold that the loss or destruction by the testator himself of a subsequent will containing a revoking clause does not revive a former will, though found in the possession of the testator, uncanceled, at his death, are based upon statutes dissimilar to the Illinois statute upon this subject, and upon considerations which have no force or application in this state and under our decisions. In England what is known as the "Statute of Victoria," passed in 1837, provided (chapter 26, § 22) that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same," etc. 29 Am. & Eng. Ency. of Law, p. 289, note 2. Some 13 of the American states have adopted either the statute of Victoria or a sim-

ilar statute upon this subject. But no such statute was ever passed or adopted in this state.

In some of the cases a distinction is drawn between a subsequent will, whose provisions are inconsistent with the former will, thereby operating to effect a revocation by implication, and a subsequent will which contains a clause expressly revoking all former wills. This distinction, however, is done away with under the terms of the Illinois statute. Section 17 of the Illinois statute of wills provides as follows: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law." 3 Starr & C. Ann. St. (2d Ed.) pp. 4044, 4045.

By the terms of this statute the subsequent will, which shall have the effect of revoking a former will, must be a will "declaring the same"; that is to say, must be a will which, upon its face and by its terms, declares a revocation. If the will must expressly contain a clause revoking all former wills, the question as to any inconsistency between the provisions of the later will and the former will is immaterial.

Again, many of the cases are based upon statutes which authorize the revocation of a will to be made by a subsequent writing which is not necessarily a will, or testamentary in its character. A large part of the American legislation upon this subject has its basis in the English statute of frauds, by one of the provisions of which "no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same," etc. 1 Underhill on Wills, § 247. It will be noticed that by the terms of this statute a devise in writing of lands, etc., may be revoked, not only by some other will or codicil in writing, but by some "other writing declaring the same"; in other words, the writing declaring the revocation may be some other writing than a will or codicil. Where the instrument of revocation is not necessarily, by the terms of the statute, a will, it may have the effect of operating instantaneously, so as to effect a revocation before the death of the testator; and if the instrument of revocation may be in writing, it will make no difference that its terms are embodied in a will, rather than in some other writing, which is not a will.

For example, one of the cases relied upon by counsel for appellants to support their contention upon this subject is the case of In re Cunningham, 38 Minn. 169, 36 N. W. 269, 8 Am. St. Rep. 650, where the

court say: "The testator might effectually revoke his former will by a writing so declaring, and executed as this instrument was executed (Gen. St. 1878, c. 47, § 9), as he might also by other means." By reference to section 9 of chapter 47 of the General Statutes of Minnesota of 1878 it is found that a will may be revoked "by some will, codicil or other writing signed, attested and subscribed in the manner provided for the execution of a will." By section 17, however, of the Illinois statute of wills, the revocation must be by a will declaring such revocation, and not by some other writing than a will, which may not be testamentary in its character. So, also, in Cheever v. North, 106 Mich. 393, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499, it appears that by the terms of the Michigan statute a former will may be revoked not only by a subsequent will, but "by some other writing signed, attested and subscribed in the manner provided in this chapter for the execution of a will." The case of Scott v. Fink, 45 Mich. 241, 7 N. W. 799, is based largely upon the case of James v. Marvin, 3 Conn. 576; but the latter case of James v. Marvin has been materially weakened, if not actually overruled, by the subsequent case of Peck's Appeal from Probate, 50 Conn. 562, 47 Am. Rep. 685.

In Peck's Appeal from Probate, supra, the criticism of James v. Marvin, supra, made by Redfield in his work on Wills, is referred to and quoted; and there the Supreme Court of Connecticut say: "The weight of authority seems to be in harmony with the views expressed by Mr. Redfield. * * * The testatrix, by executing the second will, evinced no intention to become intestate, but rather a contrary intention. By destroying the last will and carefully preserving the first she affords satisfactory evidence that she intended until the very last to die testate, and that that should be her will. In the absence of an express provision to that effect, we cannot presume that the legislature intended that the mere execution of a will should in all cases revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator. The statute requires a 'later will or codicil.' We think that means an operative will or codicil. * * * We would say, however, that we have carefully examined the cases cited by the counsel for the appellees, and find that many of them are cases in which the later wills became operative as wills; and, of course, the language of the courts must be interpreted with reference to that circumstance, and cannot properly be applied to a case like this."

So, also, in the case of Barksdale v. Hopkins, 23 Ga. 340, it appears that under the statute of Georgia a will may be revoked "by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same." Under the Georgia statute, not only may the revocation be by an instrument not testamentary in its character, but Georgia is one of the states which has adopted the Victoria statute, or a statute similar to the

Victoria statute, above quoted. In Virginia, also, section 22 of the statute of Victoria, 1837, is in force. Rudisill's Ex'r v. Rodes, 29 Grat. (Va.) 148. In Texas, also, where the doctrine seems to prevail that the destruction of a duly executed will containing an express revocation of a former will does not have the effect of reviving the former will, the statute provides that a will may be revoked "by subsequent will, codicil or declaration in writing executed with like formalities," etc. Hawes v. Nicholas, 72 Tex. 483, 10 S. W. 558, 2 L. R. A. 863.

It being established, then, that under section 17 of the Illinois statute of wills a former will can only be revoked by a subsequent will, declaring the revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character, which declares the revocation of the former will, it cannot be said that, in this state the destruction of a duly executed will containing an express revocation of a former will does not have the effect of reviving the former will. We have held that "a will takes effect at the death of the testator." Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351. Indeed, the general doctrine is that a will is ambulatory, and has no effect until the death of the testator. It follows that a testamentary paper, which the testator permits to survive him, must be his will. A will is inoperative and ineffectual, and has no legal existence, until it is consummated by death. Taylor v. Taylor, 2 Nott & McC. (S. C.) 483.

In Marsh v. Marsh, 48 N. C. 78, 64 Am. Dec. 598, it is well said: "As wills are ambulatory, and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can in any wise affect the validity of the will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact that the second contained a clause of revocation can alter the case, because that clause is just as inactive and inoperative as the rest of it, and so continues up to the time that the whole is canceled. This principle is settled in the common-law courts in England in regard to devises."

In Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837, we said: "As a general rule, if a will is traced into the testator's possession, and at his death cannot be found, the presumption is (in the absence of circumstances tending to show a contrary conclusion) that he destroyed it animo revocandi." "Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he has destroyed it himself. It cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime." Rickards v. Mumford, 2 Phillim. Ecc. 24; 29 Am. & Eng. Ency. of Law, p. 292, note 3. See, also, Boyle v. Boyle, 158 Ill. 228, 42 N. E. 140. In Boyle v.

Boyle, supra, it was held that a will will be presumed to have been destroyed by the testator himself, or at his direction, where he took it from the custodian, with whom it had been for several months, and carried it away, and it could not be found after his death.

In the case at bar the will which is said to have been executed by Jesse Stetson between September 1, 1898, and his death on April 27, 1899, is shown by the testimony of the appellants to have been taken possession of by him as soon as it was executed, and to have been carried away by him from the office of the attorney who is said to have drawn it; nor could it be found among his papers or elsewhere after his death. It is to be presumed, therefore, that Jesse Stetson destroyed this will animo revocandi. If he destroyed it with the intention of canceling or revoking it, it was canceled or revoked as an entirety. So long as Jesse Stetson was alive, this second will was merely ambulatory, and had no operation, and could have no operation until his death. While it was thus ambulatory, and before his death, the presumption is that he destroyed it, and, if he destroyed it, the clause contained in it, which revoked all former wills, was canceled and revoked, as well as the balance of the will. It necessarily results that the former will of December 3, 1897, was revived when the subsequent will, containing the revoking clause, was canceled or destroyed.

Upon this subject Redfield in his work on Wills (1 Redfield on the Law of Wills, marg. p. 328) says: "It has been held in some of the American courts that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates, proprio vigore, and instantaneously, as a revocation, and, consequently, that the destruction of the second will did not revive the former one. This doctrine has an air of plausibility from the fact that an instrument of revocation alone would unquestionably have this effect so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will with a revocatory clause is very different. It is but substituting one will for another. And the revocatory clause is made dependent in some sense upon the subsequent will going into operation. And there is ordinarily no purpose of having the revocatory clause operate, except upon that condition. The whole instrument is, therefore, ambulatory, and when destroyed it all ceases to have any operation. And the same is true of the destruction of a will merely revocatory of former wills. By such destruction, the former wills, if in existence, become revived." Peck's Appeal from Probate, 50 Conn. 566, 47 Am. Rep. 685. * * *

Our conclusion is that, inasmuch as the later will executed by the testator, Jesse Stetson, must be presumed to have been destroyed by him in his lifetime, this loss or destruction has operated as a revival

of the former will of December 3, 1897, although the later will contained a revocatory clause. For this reason the court below committed no error in dismissing the bill of the complainants. * * *

The decree of the circuit court is affirmed. Decree affirmed.[18]

In re NOON'S WILL.

(Supreme Court of Wisconsin, 1902. 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944.)

BARDEEN, J.[19] Both the county and circuit courts found that the second will executed by the deceased contained a clause revoking all former wills. This fact is challenged by the appellants, but, inasmuch as all the testimony in the case on that subject is to the effect that such a clause was contained therein, we cannot disturb the finding.

Section 2290, Rev. St. 1898, provides, in substance, that no will shall be revoked unless by burning, tearing, canceling, or obliterating the same with intention to revoke, or by some other will or codicil in writing, executed as the law requires. Therefore, where a second will is drawn and executed with the formality required by the statute, and containing an unlimited revocatory clause, all former wills are wiped out, and held for naught. The operation of the revocatory clause is immediate and absolute. It is an act done solemnly and deliberately for present effect, and not one contemplating that future circumstances are to determine whether it shall have force.

As stated by the court in Scott v. Fink, 45 Mich. 241, 7 N. W. 799: "It operates at once, and does not apply as a mere contingent caveat against the objects at which it was aimed." The addition of the revocatory words is a mode of immediate cancellation of the former will, and renders it totally inoperative as a testamentary instrument. See Cheever v. North, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; Dudley v. Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; In re Goods of Hodgkinson [1893] Prob. Div. 339. By the great weight of authority in this country the destruction or revocation of the subsequent will containing the revocatory clause does not have the effect of reviving the former will. Cassoday, Wills, § 386, and authorities cited. Therefore the fact that the second will drawn by the testator was destroyed, or could not be found after his death, did not revive or give legal vitality to the former one.

The question next arises whether there is anything in the case to show that the former will has been revived in such a way as to war-

[18] So in Bates v. Hacking, 29 R. I. 1, 68 Atl. 622, 14 L. R. A. (N. S.) 937 (1908), the court holds that, while a revocation by a writing which is not a will takes effect at once, a revocation by will does not take effect, no matter what the testator's intentions may be, unless the will becomes effective on the testator's death.

[19] The statement of facts and a part of the opinion are omitted.

rant the court in admitting it to probate as a legal will. * * * We start with the assumption that the first will had been duly revoked, and was not revived by the loss or destruction of the second. The first will was then without any legal validity. The situation was the same as though it had never been written. Section 2282 provides that no will made within this state since January 1, 1896 (except nuncupative wills), shall be effectual to pass any estate, unless it be in writing, signed by the testator, or by some one authorized by him, and attested in the presence of the testator by at least two witnesses in the presence of each other.

This court has decided that it is not necessary to the validity of a will that the witnesses thereto should know the nature of the instrument they are signing; nor is it necessary to the probate thereof that they should testify that the testator declared it to be his will. Allen v. Griffin, 69 Wis. 529, 35 N. W. 21; Skinner v. Society, 92 Wis. 209, 65 N. W. 1037. The will, however, must be executed in substantial conformity to the statutory requirements, to be valid. The first will having become legally dead by revocation, we can see no way in which it could be revitalized except by some act which the law recognizes as being equivalent to execution under the statute. A codicil or subsequent writing adopting the former will, duly executed, or a re-execution of the old will with the required formalities, would undoubtedly revive it. See Skinner v. Society, supra; Flood v. Kerwin, 113 Wis. 673, 89 N. W. 845.

Any act short of that would lead to confusion, and open the door to fraud. The Legislature, having seen fit to prescribe in definite terms the manner in which a will shall be executed to be valid, have indicated a policy which ought not to be frittered away by evasions or exceptions. We are aware that there are cases in the books and cited by appellants' counsel which say that the question of reviving a will is simply one of what the testator intended. That question, no doubt, may be involved in many cases; still it cannot be permitted to override or annul plain, statutory requirements. To make a valid testamentary disposition of property, there must be substantial conformity to all statutory requirements.

We believe the better and safer rule to be to require that a will once revoked, to be revived, must either be re-executed or adopted by some subsequent writing executed as the statute requires. Gary, Prob. Law, § 172. The judgment is affirmed.[20]

[20] In Danley v. Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640 (1908), the court explained that in Michigan, where publication is not required in the execution of a will, a revival of a revoked will can take place only where the testator's intention to revive the revoked will is "expressed in writing, formally sufficient to satisfy the statute." The majority opinion added (150 Mich., at page 596, 114 N. W., at page 472 [121 Am. St. Rep. 640]): "This court, having declined to follow the rule of the English law courts, is not relegated of necessity to that of the ecclesiastical tribunals."

CHEEVER et al. v. NORTH et al.

(Supreme Court of Michigan, 1895. 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499.)

MONTGOMERY, J.[21] This is an appeal from the judgment of the circuit court probating the will of Merchant H. Goodrich, who died February 19, 1892. The will probated bore date May 12, 1888. It was in testimony, and not disputed, that deceased, in December, 1888, or January, 1889, executed another will, to which Dr. John Greenshields and R. L. Parkin were witnesses. There was also testimony tending to show that the will offered for probate was found among the papers of deceased, and that no other will or codicil was found.

The jury found, in answer to special questions, that the Greenshields and Parkin will was destroyed by decedent, and that a codicil, of which an abstract was in evidence in the case, was executed as a codicil to the will offered for probate, and that Goodrich also destroyed this codicil. The jury further found that the subsequent will, known as the "Greenshields and Parkin Will," was executed by Goodrich, and that it made a complete disposition of his estate. There was no finding by the jury, nor was there any evidence, upon the subject of whether the subsequent will contained a revocation of the prior will, in terms.

1. The circuit judge charged the jury, in effect, that a second will, which contained an express revocation of a prior will, would have the effect to revoke it, but that, if the later will contained no clause revoking the former will, the subsequent destruction of the later will by the testator would revive the former will. There is an irreconcilable conflict of authority upon the question of the effect of the destruction of a second or subsequent will upon an earlier one. The great weight of authority is to the effect that the execution of a subsequent will, containing an express clause revoking the former will, operates as a revocation at once, and that the former will thus revoked cannot be subsequently revived, except by republication, and is not renewed by a destruction of the later will. James v. Marvin, 3 Conn. 576; Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322; Scott v. Fink, 45 Mich. 241, 7 N. W. 799, and cases cited.

But we think the weight of authority, and also the previous expressions of this court in Scott v. Fink, favor the doctrine that, as to a will containing no express clause of revocation, it does not have the effect, of its own force, to revoke the former will, and that the destruction of such later will effects a revival of the earlier will. The cases which maintain this doctrine rest upon the ground that all wills are, in their nature, ambulatory until the testator's death, at which

[21] Part only of the opinion is given.

time, and not before, the testament becomes operative. Flintham v. Bradford, 10 Pa. 82; Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685; Simmons v. Simmons, 26 Barb. (N. Y.) 77; and cases cited supra.

We are cited to the statute (section 5793, How. St.) which provides: "No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator or by some person in his presence and by his direction, or by some other will or codicil, in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will." And it is urged, with much show of plausibility, that the execution of a new will operates, under this statute, to revoke the former will. Such, however, is not the strict reading. If, at the common law, a will duly executed is ambulatory, and is held, for the purposes of this question, to take effect only at the death of the testator, we think the statute should be construed as having reference to the common-law rule. The revocation may be by some other will, but it occurs when the will takes effect, not when executed. This statute no more than declares the common law on the subject. * * *

2. The burden of proof is upon a party who asserts that the later will contains a clause of revocation. Thornt. Lost Wills, 162; 1 Beach, Wills, 73; Caemen v. Van Harke, 33 Kan. 333, 6 Pac. 620. * * *

Other questions are presented by the appeal of the contestants, which we have examined, but deem it unnecessary to discuss in this opinion. We think no error was committed to the prejudice of the contestants. * * *[22]

[22] Compare Danley v. Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640 (1908). But in Dougherty v. Holscheider, 40 Tex. Civ. App. 31, 88 S. W. 1113 (1905), a contingent holographic will, which never became effective because the contingency on which it was to do so did not happen, but which was inconsistent with a prior will, was held to have revoked the prior will, and to have made such will ineffective without a republication.

In Newton v. Newton, 12 Ir. Ch. 118 (1861), it was held that a will revoked absolutely by another will and thereafter destroyed by the testator could not be revived by a codicil, though the codicil, by seeking to revive it, evinced, in the opinion of the court, an intention that a subsequent will should not remain a will. The court said: "The will itself had been destroyed. It was as if it had never existed. It was no longer in rerum natura, and could not, therefore, be incorporated with the codicil." In Rogers v. Goodenough, 2 Sw. & Tr. 342, 350 (1862), the court said that the provision of the Wills Act that "no will shall be valid unless it be in writing and executed in the manner hereinafter mentioned" is decisive of that question, because "the expression 'no will shall be valid' applies equally to an original will and a revived will." See, also, Hale v. Tokelove, 2 Rob. Ecc. 318 (1850); In the Goods of Steele, L. R. 1 P. & D. 575, 576, 577 (1868).

WILLIAMS et al. v. WILLIAMS.

(Supreme Judicial Court of Massachusetts, 1886. 142 Mass. 515, 8 N. E. 424.)

C. ALLEN, J.[23] There was proof, satisfactory to the mind of the justice who heard the case, that the testator, in canceling his last will, intended to revive the former one, which he then left uncanceled; and his conclusion of fact was well warranted by the evidence. Such proof may come from a single witness (Brown v. Brown, 8 El. & Bl. 876; Burns v. Burns, 4 Serg. & R. [Pa.] 297); and, being found sufficient to establish the fact, the legal result follows that the former will is thereby revived (see Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322, and authorities there cited; 2 Am. Lead. Cas. [4th Ed.] 709 et seq.). The fact that the testator executed three wills at different times, all of which were kept by him for a time uncanceled, and that when he executed the third will he said that he would keep them all until he made up his mind which he wanted to keep, and would destroy the two he did not want, did not have the legal effect to place the three wills on an equal footing of unexecuted and unpublished wills.

The last will, if left unrevoked, would be valid. Decree affirmed.

JAMES v. SHRIMPTON.

(High Court of Justice, Probate Division, 1876. 1 P. D. 431.)

Sir J. HANNEN (President).[23] This case was tried before me, and the following facts were proved: On the 12th of October, 1871, the testator duly executed his will, and on the 3d of July, 1872, he married, whereby his will was revoked. On the same day, and after his marriage, he executed a codicil, in which he made a provision for his wife; and the codicil contained a clause to this effect: "In all other respects I revive, ratify, and confirm my said will." Afterwards circumstances occurred by reason of which the provisions of the codicil failed, and it is probable that he then destroyed it.

The question for my consideration is, whether the destruction of the codicil upon which the revival of the will depended has left the will inoperative. I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was, that the will, having been brought into existence again, remained valid notwithstanding the destruction of the codicil. I was asked to grant probate of the will and codicil on the presumption that what the testator had done had not been done animo revocandi. Where there has been a physical destruction of a testamentary paper the court has often been

[23] The statement of facts is omitted.

called upon to form an opinion as to the intention of a deceased at the time he did the act.

In this case I have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was done under a misconception of the effect of the act; it was not done animo revocandi, and I therefore decree probate of the will and codicil.

CROSBIE v. MACDOUAL.

(High Court of Chancery, 1799. 4 Ves. 610.)

See ante, p. 352, for a report of the case.

GREEN v. TRIBE.

(High Court of Justice, Chancery Division, 1878. 9 Ch. D. 231.)

See ante, p. 354, for a report of the case.

In re CAMPBELL.

(Court of Appeals of New York, 1902. 170 N. Y. 84, 62 N. E. 1070.)

See ante, p. 359, for a report of the case.

PART II

DESCENT

CHAPTER I

THE NATURE OF DESCENT

SECTION 1.—DESCENT AND CONSANGUINITY

BLACKSTONE ON DESCENT.

"The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: Descent, where the title is vested in a man by the single operation of law; and purchase, where the title is vested in him by his own act or agreement.

"Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law.[1] An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate, so descending to the heir, is in law called the inheritance. * * *

[1] The word "descent" is here used in its technical sense. In some states it is given a wider meaning.

"It is true that the word 'descent,' in its technical, legal meaning, denotes the transmission of real estate, or some interest therein, on the death of the owner intestate, by inheritance, to some person according to certain rules of law. In such meaning it is distinguished from transmission by devise, which is technically by purchase, and also from the transmission of personal property, the title of which passes to the administrator, and, after the payment of all debts and claims against the estate, is governed by certain rules of distribution. If the meaning of the term 'descent' is so limited to its technical significance, the provisions of the act relating to the distribution of personal estate are not within such meaning. The term as used in the act, and as it has always been used in our statutes, includes the course of transmission, by operation of law, of both real and personal property when the owner dies intestate, or his estate or any part thereof is deemed and taken as intestate estate." Cartwright, J., in Hudnall v. Ham, 172 Ill. 76, 83, 84, 49 N. E. 985, 987 (1898).

On the statutes of descent and distribution, in the United States, see 3 Prob. Rep. Ann. 556, note. On succession to estates of intestates in general, see 12 Am. St. Rep. 81–113, note.

"Consanguinity, or kindred, is defined by the writers on these subjects to be 'vinculum personarum ab eodem stipite descendentium'; the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

"Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the propositus in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards. The father of John Stiles is related to him in the first degree and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil and canon, as in the common, law. * * *

"This lineal consanguinity, we observe, falls strictly within the definition of vinculum personarum ab eodem stipite descendentium; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

"Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestors, but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the stirps, or root, the stipes, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who hath each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanguineos.

"We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus Titius and his brother are related; why? because both are derived from one father. Titius and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. * * *

"The method of computing these degrees (of collateral consanguinity) in the canon law, which our law has adopted, is as follows: We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is

distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree; for from the father to each of them is counted only one. Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor—viz., his own grandfather, the father of Titius."

2 Bl. Com. 201–207.

SECTION 2.—BLACKSTONE'S CANONS OF DESCENT

"The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons of inheritance, according to which estates are transmitted from the ancestor to the heir, together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

"I. The first rule is: That inheritance shall lineally descend to the issue of the person who last died actually seised in infinitum, but shall never lineally ascend.[2] * * *

"II. A second general rule or canon is: That the male issue shall be admitted before the female.[3] * * *

"But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained. It only postpones them to males; for though daughters are excluded

[2] "This rule was changed in England, by St. 3 & 4 Wm. IV, c. 106, which went into effect in 1834. The rule now established is that inheritance shall be traced from the last purchaser of the property; and for this purpose the person last entitled to the property shall be deemed to be the purchaser, unless it be proved that he inherited it. The ancient maxim, "seisina facit stipitem," is therefore entirely abrogated. The person 'last entitled to the property' includes the last person who had a right thereto, whether he did or did not obtain the possession, or receive the rents and profits thereof.

"The rule that inheritances never lineally ascend has also been altered; and it is now provided that an inheritance shall descend to the issue of the last purchaser, and that, on failure of his issue, it shall pass to his nearest lineal ancestor, or the issue of such ancestor, the ancestor taking in preference to his or her issue. Paternal ancestors and their descendants are preferred to maternal ancestors and their descendants.

"In this country, the doctrine, 'seisina facit stipitem,' has also been abolished in most, if not all, of the states, and an estate of inheritance passes to the heirs of the person who last had the right of ownership therein; and it is also a general rule that, in default of lineal descendants, lineal ancestors inherit, in preference to relatives of the collateral line. But collateral relatives are usually admitted after a father or mother, in preference to more remote lineal ancestors."—Chase's Note.

[3] "This canon is still in force in English law, but does not prevail in the United States, where it is the established rule that all the children shall inherit equally, males and females being classed together."—Chase's Note.

by sons, yet they succeed before any collateral relations; our law thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

"III. A third rule or canon of descent is this: That where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together.[4] * * *

"IV. A fourth rule, or canon of descent, is this: That the lineal descendants, in infinitum, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.[5]

"Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the youngest son, and so in infinitum. And these representatives shall take neither more or less, but just so much as their principals would have done. * * *

"This taking by representation is called succession in stirpes, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. * * *

"V. A fifth rule is: That on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.[6] * * *

"VI. A sixth rule or canon therefore is: That the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.[7] * * *

[4] "This right of primogeniture is not recognized in the United States. No distinction is made between the children in regard to their interests in the estate of the deceased."—Chase's Note.

[5] "This is also the general rule in the law of descent in the United States, when the lineal descendants are of unequal degrees of relationship to the common ancestor in whose estate they share. But, when they are of equal degrees of relationship, they take per capita; i. e., equally, or share and share alike."—Chase's Note.

[6] "This rule is now modified by the provision, stated in a previous note, that lineal ancestors shall inherit in preference to collateral kindred.

"The rule generally established in the American law of descent, which is most closely correspondent to this English rule, is that, in default of lineal descendants or ancestors who are first entitled to inherit the property, the inheritance passes to collateral relatives. The classes of relatives who shall inherit in such a case are specially designated by the statutes of the several states, and there is considerable diversity of detail in the provisions of such statutes."—Chase's Note.

[7] "This rule has also been altered to some extent by St. 3 & 4 Wm. IV, c. 106. Relatives of the half blood are now entitled to inherit next after any relation in the same degree of the whole blood and his issue, when the common ancestor is a male, and next after the common ancestor, when the common ancestor is a female.

"In this country, there is much diversity, in the statutory provisions of different states, in regard to inheritances by relatives of the whole and of the half blood. In some states, no distinction is made between those two classes; but, in the larger number, relatives of the half blood are postponed to those of the whole blood. In no state, however, are those of the half blood entirely excluded from the inheritance."—Chase's Note.

For a discussion of descent and distribution among kindred of the half blood, see 29 L. R. A. 541, note.

"VII. The seventh and last rule or canon is: That in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have, in fact, descended from a female." [8]

2 Bl. Com. 208–234.

SECTION 3.—SEISIN AND DESCENT

NORTH v. GRAHAM et al.

(Supreme Court of Illinois, 1908. 235 Ill. 178, 85 N. E. 267, 18 L. R. A. [N. S.] 624, 126 Am. St. Rep. 189.)

CARTER, J.[9] This is an action in ejectment brought by appellee in the circuit court of Edgar county against appellants to settle the ownership of a small tract, containing about a quarter of an acre of land, situated in that county. * * * The court entered judgment, holding that appellee was the owner of and entitled to the possession of the property in question. An appeal was thereupon prayed to this court.

From the agreed statement of facts it appears that Adam Stewart died in 1888, intestate, leaving no widow, and leaving as his only heirs at law his three daughters, Martha Stewart, Demeris Snyder, and the appellee, Mary North. Martha Stewart died in 1889, unmarried and without children. Demeris Snyder died in 1892, leaving W. W. Snyder, her husband, and Myrtle Snyder, her daughter and only heir at law. Myrtle Snyder died in 1898, unmarried, leaving the said W. W. Snyder, her father, her only heir at law. It appears that Adam Stewart and his wife February 1, 1877, made a deed of the land in question to the trustees of a Methodist church called "Pilot Class," of Edgar county, containing this provision: "Said tract of land above described to revert to the party of the first part whenever it ceases to be used or occupied for a meetinghouse or church." On July 10, 1886, Adam Stewart and wife quitclaimed the 80-acre tract of which this meetinghouse piece formed a part, with other property, to his brother, James Stewart, and the property thereafter, by a chain of conveyances, was conveyed from James Stewart to the appellants in this case. * * *

[The court then discussed the question of the nature of the interest

[8] This general rule still prevails in England, though somewhat modified in detail, but not in this country. In some states, however, lands descended from a maternal ancestor go to kindred in the maternal line, and paternal inheritances to paternal kindred.—Chase's Note.

[9] Part only of the opinion is given.

left in Adam Stewart after his deed to the church and decided that it was not a reversion, but merely a possibility of reverter, and concluded that discussion as follows:]

It is clear from these authorities that the right remaining in the grantor, Adam Stewart, after he had given the deed to the church organization (so long as it was a mere possibility of reverter), was not one that he could convey or assign, and hence his quitclaim deed given thereafter to his brother conveyed no interest of any kind or nature in the land in question. Presbyterian Church v. Venable [159 Ill. 215, 42 N. E. 836, 50 Am. St. Rep. 159].

Appellants make the further contention that, even though the deed in question reserved in the grantor and his heirs only the possibility of a reverter, still the court should not have entered judgment in favor of appellee for all the premises; that the three daughters of Adam Stewart succeeded him, at his death, in the ownership of this possibility of reverter; that one daughter, Martha Stewart, died unmarried, without children, leaving her sisters, Demeris Snyder, and appellee, who succeeded her as owners of her interest in this possibility of reverter; and that Demeris Snyder's interest descended to her daughter, Myrtle, and through her to her father, William W. Snyder, who has since conveyed whatever interest he had to appellants. The authorities lay down the rule that the possibility of reverter, while it cannot be alienated or devised by the grantor, may "descend to his heirs." Presbyterian Church v. Venable, supra.

Did the land in question revert or descend to the grantor's heirs who were in existence at the time of his death, or to his heirs who were in existence at the time the fee in question terminated? The authorities do not appear to discuss this precise question. The right or interest under the possibility of reverter is very like, though, as we have seen, not strictly identical with, a reversion. Kales on Future Interests, § 1. In 1 Preston on Estates, 445, it is stated "that succession by heirship to these determinable fees is in the same order and under the same rules as the succession to estates in fee simple." Under the common law the reversion descended to the heirs of the person who was last seised in fee. Tiedeman on Real Prop. (3d Ed.) § 293; 4 Kent's Com. *388. Though the law passed an inheritance to the heir immediately upon the ancestor's death, he thereby only acquired a seisin in law, and this alone would not enable him to transmit the inheritance to his heirs. He must have obtained an actual seisin or possession or seisin in deed, according to the maxim, "Seisina facit stipitem," as contradistinguished from a seisin in law, in order to make the estate transmissible to his heirs. 27 Am. & Eng. Ency. of Law (2d Ed.) 297. This common-law doctrine was followed by the courts in early decisions of some of our states, but was repudiated by many, and has now been abrogated in most, if not all, so that "reversions and remainders vested by descent pass to the heirs in like man-

ner as other estates, and no distinction is made between estates in possession and in reversion." 4 Kent's Com. *389; Tiedeman on Real Prop. (3d Ed.) § 293.

The laws of this state governing devises and descent of property are wholly statutory, as none of the common-law provisions relating thereto are now in force in Illinois. Kochersperger v. Drake, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; In re Mulford, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249; Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54. The right or interest remaining under the said deed in the grantor, Adam Stewart, as we have seen, was such a right or interest as descended to his heirs. Our statute on descent states that "estates, both real and personal, of resident and nonresident proprietors in this state dying intestate * * * shall descend," etc. The word "estate" is used with a variety of meanings. 16 Cyc. 599. In its primary and technical sense it referred only to an interest in land, and doubtless that was its meaning under the common-law definition of possibility of reverter. In our statutes controlling descent and devise of property it undoubtedly refers to all interests in property to which the deceased shall be entitled.

In Greenwood v. Greenwood, 178 Ill. 387, 398, 53 N. E. 101, 102, we held: "The word 'estate' has a broad signification, and would, of course, be sufficient to pass personalty." Real and personal property, under our statutes, are treated together for the purpose of tracing descent. This common-law doctrine to which we have just referred never had any relation to the distribution of personal property. We think it must be held in this state that on the death of the ancestor the descent, whether as to real or personal property, was cast upon the heirs, without reference to the actual seisin of the ancestor. Hillhouse v. Chester, 3 Day (Conn.) 166, 3 Am. Dec. 265. Indeed, it was held by Justice Story in Cook v. Hammond, 4 Mason, 467, Fed. Cas. No. 3,159, that the word "seisin," under acts of descent in this country, was equivalent to "ownership." * * *

The right or interest reserved by the deed in question to the grantor and his heirs must have been in some one between the death of the original grantor, Adam Stewart, and the determination of the estate when the property ceased to be used and occupied as a church. It is an interest that is inherited, and therefore must have been cast by descent upon Adam Stewart's heirs at the time of his death, and did not originate at the time the property ceased to be used for church purposes. This conclusion is supported by the great weight of authority, and is in harmony with the customs and practice, not only in this state but of the country at large. Under this rule the three daughters of Adam Stewart inherited this interest in equal parts. Through the deaths of various heirs, one-half interest descended to William W. Snyder, the husband of one of these daughters, and was owned by him

at the time said property ceased to be used as a church. He thereafter, May 5, 1906, after the commencement of this suit, quitclaimed his interest to Samuel Graham, one of the appellants herein. * * *

The trial court should have entered judgment in favor of appellee, not for the entire premises, but for one-half of the premises. For the reasons indicated, the judgment of the circuit court will be reversed and the cause remanded.

Reversed and remanded.[10]

SECTION 4.—DESCENT AND DISTRIBUTIONS

THE STATUTE OF DISTRIBUTIONS.

By St. 22 & 23 Car. II, c. 10, explained by St. 29 Car. II, c. 30, it is enacted that the surplusage of intestates' estates (except of femes covert, which are left as at common law) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants. If there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives. If no widow, the whole shall go to the children. If neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, further than the children of the intestate's brothers and sisters. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration, of whom we have sufficiently spoken. And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate, and without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the fa-

[10] Even at common law actual seisin was construed as liberally as possible. "Where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact. But, when there is a tenant, his possession becomes that of the heir immediately on the death of the ancestor. The subsequent misconduct of the tenant in paying rent to another person, or the mistake of the heir as to his rights, cannot by relation alter the nature of the seisin which he before had." Bayley, J., in Bushby v. Dixon, 3 B. & C. 298, 305 (1824). In the same case, Abbott, C. J., declared that "the possession of a tenant for years, being a rightful possession, is considered in law as the possession of the heir, and, therefore, gives him a seisin in fact." Id.

ther; but by St. 1 Jac. II, c. 27, if the father be dead, and any of the children die intestate, without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

2 Bl. Com. *515, *516.[11]

HENRY v. HENRY.

(Supreme Court of North Carolina, 1848. 31 N. C. 278.)

Appeal from the superior court of law of New Hanover county, at the fall term 1848; his honor, Judge Manly, presiding.

The petitioners allege that they are the "heirs at law" and "distributees" of Hezekiah Bonham, who died intestate; that the defendants are the administrators of the said Bonham, and, as such, took into their possession negroes, bonds, money, and other personal property to a large amount. The prayer is for an account and distribution.

The defendants admit that they are the administrators de bonis non of Bonham, but they allege that administration upon his estate had been before granted to one Neil Henry, who had died intestate, and that one Nathan Bonham is the administrator of the said Neil Henry. They therefore insist that they are liable to account with the said Nathan Bonham, and not with the petitioners, Ann Henry or her children. They further allege that Neil Henry committed a devastavit to the amount of about $800, and they are the sureties on his administration bond. "They maintain that the estate of the said Neil Henry is responsible for this deficiency, and the defendants having the share of the estate of the said Hezekiah Bonham in their hands, to which the representatives are entitled, they have a right to retain the same, or so much thereof as shall be sufficient to pay, satisfy, and discharge the said deficiency."

A reference was made to the clerk to take an account. The clerk made a report, to which the defendants filed an exception. The case came on to be heard upon the petition, answer, report, and exception. The exception was overruled, and the report was confirmed, and a decree for the petitioners, from which the defendants appealed.

PEARSON, J. The petitioners claim the personal estate of the intestate as his "heirs at law" and "distributees." The word "heirs" is used to denote the persons who are entitled, by descent, to the real estate of a deceased ancestor. It is appropriated to that purpose, and when used in pleading, in reference to personal estate, it has no meaning, and must be rejected as surplusage.

11 See St. 22 & 23 Car. II, c. 10, in the Appendix. Local statutes should be consulted. On the statutes of descent and distribution in the United States, see 3 Prob. Rep. Ann. 556, note.

The other word, "distributees," is new in pleading; but my Brother NASH and myself deem it admissible to denote the persons who are entitled, under the statute of distributions, to the personal estate of one who is dead intestate.

No one word has heretofore been used for that purpose, and it has been necessary, in order to convey the idea, to make use of a paraphrase or set of words. "Widow" or "next of kin" are sometimes used in pleading, but these words are insufficient to convey the idea; for "next of kin" means nearest of kin, and does not include those who are entitled by representation. The statute of distributions uses the words "next of kin of the intestate, who are in equal degree, and those who legally represent them." To avoid the use of so many words, it is certainly desirable to have one word to convey the idea in reference to personal estate; and as there is a necessity for making a word, we can see no objection to the word "distributees." It commends itself, because it is new, and has not been appropriated to any other use, and is as fit and seemly a word as feoffee, mortgagee, bargainee, bailee, indorsee, etc. We know the word "distributee" is now in common use among the legal profession, and the fact that it has been adopted by the profession and the Legislature, notwithstanding the severe rebuke given to it by Chief Justice Henderson in Croom v. Herring, 11 N. C. 393, is a convincing proof that the necessity for a new word really existed.

But, yielding to the petitioners the benefit of this word, they have not entitled themselves to a decree, because there is no proof that they are distributees. The answer does not admit it, and no depositions have been taken; and we should reverse the decree made below, and dismiss the bill, but for the fact that the answer is equally defective, and we feel disposed to extend great indulgence to proceedings commenced in the county court. The answer does not state the ground upon which the defendants maintain their right to retain the share of the estate to which the representatives of Neil Henry are entitled. Nor does it state upon what ground Neil Henry became entitled to a share of the estate of Hezekiah Bonham. We conjecture from what is stated, for the first time, in the decree, that Neil Henry was the husband of Ann Henry, the petitioner, and that the defendants wished to raise the question whether, as husband, he was not entitled to her distributive share; but there are no allegations to raise the question and no proofs whatever.

The decree made below must be reversed, with costs in this court, and we will then direct the cause to be remanded upon the motion of the petitioners, so as to let in amendments and give an opportunity to make proofs of the allegations. If no such motion is made at this or the next term, the petition will be dismissed.

RUFFIN, C. J.[12] Having the misfortune to differ in opinion with my Brothers on one point in the case, I must take the liberty of stat-

ing my reason. * * * It is indispensable that a plaintiff should in his pleading give himself a title to the thing he demands, for the court cannot declare one which is not set up. These plaintiffs say they are the "heirs at law and distributees" of the intestate, Bonham, and they pray that the defendants may be decreed to pay to "the said heirs" their portions of the estate, and that the negroes may be divided "among the heirs as aforesaid." The plaintiffs, therefore, claim as "the heirs and distributees" of the intestate. The statute distributes the personal estate of an intestate among his "widow and children or next of kin in equal degree or their legal representatives," and not to the heirs. The term "heirs" has no proper signification in respect to the right of succeeding to personalty. It is often used in wills and in inaccurate conversation to signify, in an improper sense, children sometimes, and at other times descendants, or issue, or nearest of kin, or the persons entitled under the statute of distributions; and these different meanings are arrived at from the context. But it surely would not be tolerated in pleading as expressing either of those senses, or constituting a title under the statute to the personal estate of an intestate, after debts paid. Upon that point, however, my Brethren and I concur.

The other term, by which the plaintiffs describe themselves and make title, is yet more objectionable, as I conceive. "Heirs" is an English word, and a term of the law, and is, therefore, understood, though improperly applied to this subject. But "distributees" is not a word at all known in the law or the language. Until my Brothers told me that they understood what it meant, I must humbly beg pardon for saying that I looked upon it as a newly invented barbarism, and without any settled sense. Indeed, I do not now understand from what source the meaning of the term is derived. I believe it is a phrase which is sometimes used in common parlance by persons who are not of the profession and do not aim at accuracy in speaking on legal subjects. Some members of the bar may have thence fallen into the use of it sometimes in discussion, when precision of expression is of the less importance as there is opportunity for explanation. But those who indulge themselves in that mode of speech, are so sensible of its impropriety that, as Judge Henderson remarked in Croom v. Herring, 11 N. C. 393, they seldom use "distributee" without an apology, knowing that it is not to be found in any English dictionary, or English book—much less in a law book. I believe I may add that up to this day it has not obtained admission into any American dictionary, though at least one of them has been supposed to have taken in every word that could possibly be tolerated.

But, when used, it has not seemed to me, at least, to be in any definite sense. Like "heirs" in reference to personalty, it has appeared to

12 Part of the dissenting opinion of Ruffin, C. J., is omitted.

be intended sometimes to designate children by it; at others the widow and children, or all the kindred, or a single one, that may be entitled to a distributive share or the whole property, by original right or by representation, or even a person entitled to a share by assignment. I know I have heard a single child called "sole distributee," and also that one, who had purchased a share, "had become a distributee." So I had really supposed that there was no meaning attached to the word by itself, in the mind of any one, but that it varied in vulgar use with the context, and that, therefore, it was wholly inappropriate to describe a title to property in pleading and entries. In wills or contracts the courts would be obliged to receive it in some sense, and would endeavor to discover that which would subserve the intention in the particular case. If, perchance, it were to find its way into a statute, the judicial duty would be the same. But that would not render it proper to transfer it into judicial proceedings. For legislators, like testators, take the right to puzzle judges as much as they please, and often do not trouble themselves much in the selection of terms. The same latitude, however, is not to be claimed by pleaders and clerks. Pleadings and the entries of judgments and decrees ought to be in the language of the law. For them there are precedents, settled long ago by the wise and the learned, and used from generation to generation by those who were and are as discreet and well informed as any among us can claim to be. * * *

PER CURIAM. Petition to be dismissed, unless the plaintiffs apply at the next term to have the cause remanded.[14]

[14] The term "distributee" has the advantage of having only one meaning, whereas the phrase "next of kin" is used in two senses.

"It seems to me that by next of kin this statute meant distributees of the deceased intestate. * * * This phrase [next of kin] frequently occurs in wills; and while it is true that the courts interpret it very generally as meaning nearest blood relation, yet when from the context or other portions of the will it is apparent that the testator intended to include in the phrase all his distributees, the courts will so construe the phrase and include in it a widow or surviving husband, though to justify such a construction of a will it must be very apparent that the testator meant that it should have this comprehensive meaning. * * * The courts have, however, it seems to me, been less strict in confining the phrase next of kin to blood relations, when statutes were to be construed, and have frequently interpreted this phrase to include a husband or wife." Green, J., in Seabright v. Seabright, 28 W. Va. 412, 465, 466 (1886). See French v. French, 84 Iowa, 655, 51 N. W. 145, 15 L. R. A. 300 (1892); Steel v. Kurtz, 28 Ohio St. 191 (1876); Betsinger v. Chapman, 88 N. Y. 487 (1882). For a decision adhering in the construction of a will to the primary meaning of "next of kin," which "includes neither a widow nor a husband," see Matter of Devoe, 171 N. Y. 281, 63 N. E. 1102, 57 L. R. A. 536 (1902). O'Brien, J., dissented.

SECTION 5.—PARTIAL INTESTACY

In re WILLBOR.

(Supreme Court of Rhode Island, 1897. 20 R. I. 126, 37 Atl. 634, 51 L. R. A. 863, 78 Am. St. Rep. 842.)

MATTESON, C. J. This is a case stated for an opinion of the court, as follows: Three sisters, Charlotte Willbor, Martha T. Willbor, and Eliza Ann Willbor, late of Newport, deceased, all perished in the same calamity—the burning of their house in Newport. They left instruments in writing, purporting to be their last wills and testaments, which have been duly admitted to probate. By these wills each testatrix gave and devised all her real and personal estate to her two sisters, or to either of the survivors, and to their heirs and assigns forever, and then, having first directed that, after the decease of the last sister, the necessary debts should be paid, proceeds to give to her two nieces, Emily N. Willbor and Maria H. Willbor, $500 each, and to Thomas W. Smith $200. The legatee Emily N. Willbor died before the testatrices. The only heirs at law of the testatrices are Abbie R. Richards, Ann Elizabeth Clarke, Mary H. Adams, Sarah T. Bliven, and Maria H. Willbor.

Upon these facts, the questions propounded are: (1) What is the amount of the legacies to which Maria H. Willbor and Thomas W. Smith are respectively entitled under the wills? (2) What portion of the estate of the testatrices passed to their heirs at law? As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment. Underwood v. Wing, 19 Beav. 459, 4 De Gex, M. & G. 633; Wing v. Angrave, 8 H. L. Cas. 183; Wollaston v. Berkeley, 2 Ch. Div. 213; In re Wainwright, 1 Swab. & T. 257; Scrutton v. Pattillo, L. R. 19 Eq. 369; Coye v. Leach, 8 Metc. (Mass.) 371, 41 Am. Dec. 518; Johnson v. Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162; Newell v. Nichols, 12 Hun, 604; Id., 75 N. Y. 78, 31 Am. Rep. 424; In re Hall, 9 Cent. Law J. 381; Russell v. Hallett, 23 Kan. 276; Estate of Ehle, 73 Wis. 445, 41 N. W. 627; 24 Am. & Eng. Enc. Law, 1027–1032.

If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of

their wills to the two sisters, or either of the survivors, did not take effect, there being no interval of time, as between the deaths of the three, during which titles to property could vest; and the wills therefore stand as if they contained only the bequests to the legatees subsequently named, to wit, Maria H. Willbor and Thomas W. Smith—the other legatee, Emily N. Willbor, having deceased without issue before the deaths of the testatrices.

We are therefore of the opinion: (1) That, after the payment of the debts of each testatrix, Maria H. Willbor and Thomas W. Smith are entitled to the legacies of $500 and $200 respectively bequeathed to them in each will, to be paid out of the personal estate of each testatrix, if the personal estate is sufficient, and, if insufficient that such legacies shall abate proportionately; (2) that the residue of the personal estate, if any, and the real estate, of each testatrix, if any, passes, as intestate estate, to her next of kin and heirs at law.[15]

SECTION 6.—EQUITABLE AND LEGAL DESCENDIBLE INTERESTS

CLAPP v. TOWER.

(Supreme Court of North Dakota, 1903. 11 N. D. 556, 93 N. W. 862.)

YOUNG, J. This is an action to quiet title to a section of land situated in Cass county, which was conveyed to the plaintiff by the executors of the last will and testament of Charlemange Tower, deceased. The complaint alleges that the plaintiff is the owner of said real estate, and that the defendants claim an interest therein adverse to the plaintiff, and prays that they be required to set forth their claims, to the end that their validity may be determined, and that title be quieted in the plaintiff.

Defendants, in their answer, allege that they are the next of kin and all of the heirs at law of said Charlemange Tower, deceased, and all the surviving legatees under his will; that said Charlemange Tower died in, and a resident of, the city of Philadelphia, Pa., and that his will was probated there; that the land in question was sold by said

[15] On the presumption of survivorship among those who perish in a common disaster, see 51 L. R. A. 863, note; 104 Am. St. Rep. 211, note. On partial intestacy as to personalty, see Dresel v. King, post, p. 720.

deceased to one Hadley upon a contract which provided for the execution and delivery of a deed to him upon the making of certain deferred payments specified in said contract; that subsequent to the death of Charlemange Tower the executors of his will foreclosed said contract by reason of the default of said Hadley in making payments according to its terms, and that said land became a part of the estate of said deceased; that thereafter the executors, acting upon the theory that said land was subject to the principle and rule of equitable conversion, and was for the purposes of administration to be treated as personal property, sold and conveyed the same to the plaintiff, who has ever since been in possession of the same, claiming the ownership and possession thereof by virtue of said deed from said executors; that the defendants are the owners of said real estate by virtue of their heirship, and ask that the title be quieted in them.

The plaintiff demurred to the answer upon the ground that it does not state facts sufficient to constitute a defense or counterclaim. The trial court sustained the demurrer, and the defendants appeal from the order sustaining the same.

The will of Charlemange Tower was before this court in the case of Penfield v. Tower, 1 N. D. 216, 46 N. W. 413. This court held that, so far as its provisions related to real estate situated in this state, it was inoperative and void, and that the real estate of said deceased in this state must be distributed according to the law of succession of this state, and that the personal property should be distributed according to the terms of the will. The only question involved upon the issue raised by the demurrer is whether the land in question should, under the facts pleaded in the answer, be treated as real estate or as personal property. If, for the purposes of administration, it retains the character of real estate, the will not being operative, it descended directly to the heirs, the defendants in this action. This is conceded. If, on the other hand, it is to be considered as personal property, it then went to the executors for the purposes of distribution, and they had full right and authority to sell and convey the same in the manner and form pursued, and to account for the proceeds to the orphans' court of the state of Pennsylvania, from which they received their appointment.

It is very properly conceded by both parties that under the rule and doctrine of equitable conversion land may be treated as money and money as land, whenever in equity, it is proper to invoke and apply the principle of that doctrine. "Equitable conversion is defined as a constructive alteration in the nature of property by which, in equity, real estate is regarded as personalty or personal estate as realty." 7 Amer. & Eng. Enc. of Law (2d Ed.) p. 464. And the doctrine has its origin in the maxim of equity that that is regarded as done which should be done. Penfield v. Tower, supra.

There is no room for doubt that upon the facts pleaded in the de-

fendants' answer the rule of equitable conversion is applicable, and that the execution and delivery of the contract of sale of the real estate in question by Charlemange Tower during his lifetime—and the same was valid and enforceable at the time of his death—worked a conversion of the land into personalty. His interest, after the execution of the contract and at the time of his death, was the money contracted to be paid by the purchaser, and the purchaser's interest was the land contracted to be conveyed. In such cases, says Pomeroy, in his work on Equity Jurisprudence (section 105), "the vendor still holds the legal title, but only as a trustee, and he in turn acquires an equitable ownership of the purchase money. His property, as viewed by equity, is no longer real estate, in the land, but personal estate, in the price; and, if he dies before payment, it goes to his administrators, and not to his heirs. In short, equity regards the contracting parties as having changed positions, and the original estate of each as having been 'converted'—that of the vendee from personal into real property, and that of the vendor from real into personal property."

The doctrine is laid down in Williams et al. v. Haddock, 145 N. Y. 144, 39 N. E. 825, as follows: "Courts of equity regard that as done which ought to be done. They look at the substance of things, and not at the mere form of agreements, to which they give the precise effect which the parties intended. It is presumed that the vendor, in agreeing to sell his land, intends that his property shall assume the character of the property in which it is to be converted, and it cannot be denied that it is competent for the owner of land thus to make such land into money at his sole will and pleasure. If the vendor die prior to the completion of the bargain, provided there has been no default, the heir of the vendor may be compelled to convey, and the proceeds of the land will go to the executors as personal property."

The rule is uniform, we think, that, where a valid and binding contract of sale of land has been entered into, such as a court of equity will specifically enforce against an unwilling purchaser the contract operates as a conversion. Keep et al. v. Miller, 42 N. J. Eq. 100, 6 Atl. 495. See, also, 7 Am. & Eng. Enc. of Law (2d Ed.) 471, cases cited in note 1.

The only authority cited by appellants in opposition to this general rule which can be said to be at all in point is Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526. That case, however, cannot be considered as an authority in their favor, for in that case the contract of sale was not enforceable, and for that reason it was held that a conversion was prevented. Had the contract been valid and enforceable, as the contract in the case at bar, it is evident that the decision would have been otherwise.

The real estate in question, having assumed the character of personalty went to the executors, and it continued as personalty for the purposes of administration, so that the executors could, after the can-

cellation of the contract, sell and convey the same to the plaintiff in the manner and form pursued.

The demurrer to the answer was, therefore, properly sustained, and the order will be affirmed.[16]

[16] But see the statement of Lord Hardwicke in Attorney General v. Day, 1 Ves. Sr. 218, 220 (1749), that "there is no case where the representative of the personal estate is entitled to claim the money, arising by sale of the lands, as personal estate, except where one or other of the contracting parties is entitled to carry it into execution in a court of equity; for where the court holds it ought not to be executed, there is no conversion of real into personal in consideration of the court, upon which that right of the executor depends; for if not effectually converted into money, it must be considered according to its original nature as real, and the heir at law must have the benefit."

Where the conversion is to take place because of provisions in a will, and "the object which was to be gained by the conversion of the property has wholly or partially failed," there are several decisions. "Let us begin with a simple case. A. by his will leaves land to trustees, upon trust to sell and to pay the proceeds to B. B. dies in the lifetime of A., and (not being a descendant of the testator—see the Wills Act, § 33) the disposition of the proceeds of sale fails utterly. The sale, then, is not required for any purpose whatever, and as between the testator's heir at law and his next of kin we shall, I think, have little difficulty in deciding in favor of the heir. But A. by his will leaves land to trustees upon trust to sell and divide the proceeds between B. and C. B. survives the testator; C. does not. Now a sale is required by the will. It is required in order that B. may have what the testator has intended to give him, namely, money, and not land. But this will exhaust but half of the fund (B. and C. were not made joint tenants, but tenants in common). What is to become of the residue? The testator's heir at law and his next of kin seem both to have plausible claims. The land must be turned into money in order that B. may get his share. Will not the other moiety also be personalty, and is it not the rule that a dead person's undisposed of personalty goes to his next of kin? In the famous case of Ackroyd v. Smithson, 1 Bro. C. C. 503, this reasoning was overruled. The land, it is true, must be sold; but that is merely in order that B. may get that moiety of the price which A. has given to him. As between his real and his personal representatives the testator has made no choice. The property comes to them, not because the testator has said that it shall come to them, but because he has not effectually given it to any one else; they are not entitled under the will, they claim in consequence of a partial intestacy—and our law is that if a tenant in fee simple dies intestate his land descends to his heir. So here the testator's heir takes the moiety of the property that was destined for C. In this case the gift to C. lapses in consequence of C.'s death in the testator's lifetime. The result would be the same if the gift to him had failed for any other reason, for instance, as being contrary to law. * * * A further point is well established, namely, that in all these cases where the heir at law becomes entitled to an undisposed of share of money to arise from the sale of land he takes it not as realty but as personalty. A. devises land upon trust for sale, and the proceeds are to be divided between B. and C. C. dies in A.'s lifetime. A.'s heir at law becomes entitled to half the property; but before the sale is made he dies—perhaps he dies intestate and the question is between his heir and his next of kin—or perhaps he has left a will devising his realty to X., and bequeathing his personalty to Y.—any way, his real and his personal representatives both claim the share, and the question is decided in favor of his personal representatives. Smith v. Claxton, 4 Madd. 484. The heir has become entitled—to what? To land that is subject to a trust for conversion into money—a trust which B. can enforce—he has become entitled to personalty. In re Richerson, [1892] 1 Ch. 379. * * * We turn to the other side of the picture and we find the same principles prevailing. The testator bequeaths personalty to trustees upon trust to purchase land and convey it to B. and C.

SHEPARD v. TAYLOR.

(Supreme Court of Rhode Island, 1885. 15 R. I. 204, 3 Atl. 382.)

STINESS, J. John Taylor devised an interest in real estate, in Providence, to his son, William H. Taylor, in trust for the use and benefit of another son, Alexander, and his heirs, with power to appoint a successor, by will or otherwise, for the support of the trust; or to convey the estate to said Alexander or his heirs, when he might think proper. Alexander died leaving, besides his widow, a son, Alexander, to whom the trustee subsequently conveyed the estate by deed, in fee. Alexander, Jr., died in May, 1882, a minor, and leaving no issue. The complainant, lessee of the estate, files this bill of interpleader to determine his liability for rent, whether to Martha O. Taylor, mother of Alexander, Jr., who claims as his heir at law; or to the other respondents, who claim that this is ancestral estate to which, under our statute, they are entitled as "the kin, next to the intestate, of the blood of the person from whom such intestate came or descended."[17] As Alexander, Jr., had the absolute title to the estate, upon his death it vested in his mother as his heir at law, unless it was ancestral estate, in which case it vested in his paternal kindred. The simple question to be determined, then, is whether the estate came "by descent, gift, or devise from the parent or other kindred of the intestate." This involves two inquiries: First, how did Alexander, Jr., acquire his

Of course, if both B. and C. die before the testator there is an utter end of the trust; the testator's next of kin will become entitled to the personal estate and will become entitled to it as personalty—for there is no trust for turning it into realty. But suppose a partial failure—C. dies before the testator but B. outlives him—or the gift fails in whole or in part owing to some rule of law, e. g. the rule against perpetuities, or the testator has forgotten to declare trusts of some share of the land that is to be bought. Whatever he has not effectually disposed of his next of kin will take, not his heir at law, he has shown no preference for his heir at law, whichever party is to succeed must claim under the law of intestate succession which gives personalty to the next of kin. Cogan v. Stephens, 5 L. J. Ch. (N. S.) 17. But again the question arises on the death of one of these next of kin who dies before any land is purchased—who will become entitled, his real or his personal representative? His real representative—his heir at law, or perhaps a devisee of 'all my realty'; for what he becomes entitled to is realty, for it is a share in a fund of money that is subject to an existing trust for the purchase of land. Curteis v. Wormald, 10 Ch. D. 172." Maitland's Equity and The Forms of Action at Common Law, 219–222.

On when there is such a failure of testator's purpose or object as to preclude the application of the doctrine of equitable conversion, see 20 L. R. A. (N. S.) 117, note. On equitable conversion by will, see 5 Am. St. Rep. 141 note. See, also, Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460 (1818); West Virginia Pulp & Paper Co. v. Miller (C. C. A.) 176 Fed. 284 (1909).

[17] As follows: Pub. St. R. I. c. 187, § 6: "When the title to any real estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift, or devise, from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin, next to the intestate, of the blood of the person from whom such estate came or descended, if any there be."—Rep.

title? Second, what is the rule to be followed when this is ascertained?

During the life of his father the title subsisted in two parts: the legal title in the trustee; the equitable title in the father. Upon the death of Alexander, Sr., unquestionably his son took the equitable title by descent. When the trustee conveyed the legal title to him, what was the nature of the title thus acquired? Clearly, it was not a title by descent, for it did not come to him from parent or kindred by operation of law. Neither was it a title by devise. Alexander, Jr., was not named in the will, nor was there any limitation in his favor, beyond that which showed the devise of an equitable fee to his father. Upon a conveyance by the trustee, the father could have disposed of the entire estate, without reference to the son. Whatever rights the son had under the will were simply those which he acquired by inheritance of his father's equitable estate. The legal estate was devised to the trustee, with a discretionary power. The conveyance of the legal title by the trustee was not a gift. Of course the word "gift" is not used in the statute in its ancient and technical application to the creation of an estate tail (2 Bl. Comm. *316); but with the common and broader meaning of a voluntary conveyance (3 Washb. Real Prop. [3d Ed.] 305). In this sense, however, there was no gift of the legal estate from the grandfather to Alexander, Jr. It did not go to him, but to the trustee; and the trustee might have conveyed it to Alexander, Sr., had he chosen to do so. There was no direction to convey the estate to Alexander, Jr. It might never have been conveyed to him and yet the trust under the will have been fully performed. The deed to Alexander, Jr., was the act of the trustee, not the act of the testator.

Alexander's rights were determined by his inheritance of the equitable estate, to which the conveyance of the legal estate, by the trustee, was incident. It cannot, then, be said that the legal estate came to him by gift from the grandfather through the conveyance by the trustee. Was it a gift by the trustee? This cannot be maintained, for the deed was made in consideration of the execution of the trust and the equitable claim of the grantee in the estate. The trustee could not at that time have disposed of it to any other person without a breach of his trust. It was not, therefore, a voluntary conveyance. It appears, then, that Alexander, Jr., had the equitable title by descent and the legal title by purchase, otherwise than by gift or devise. In such a case what is the rule of descent? Cases upon this point are not numerous, but they are sufficiently clear.

In Goodright v. Wells, Doug. 771, Lord Mansfield puts the question, "Whether, when a cestui que trust takes in the legal estate, possesses under it, and dies, the legal and equitable estate shall open on his death, and be severed for the different heirs?" He then says: "No case has ever existed where it has been so held; none where the heir at law of

one denomination has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not been united. On principle it seems to me impossible; for the moment both meet in the same person, there is an end of the trust." It was, therefore, held, in this case, the legal estate in fee having descended from the mother and an equitable interest in fee from the father, that the equitable title merged in the legal title, and that the whole estate should follow the line of descent of the legal title. Wade v. Paget, 1 Brown, Ch. 363, also in 1 Cox, 74.[18]

In Selby v. Alston, 3 Ves. Jr. 339, where the equitable title descended ex parte paterna and the legal title ex parte materna, and united in the same person, the Master of the Rolls, afterwards Lord Alvanley, citing Wade v. Paget, said: "There Lord Thurlow lays down a universal proposition, to which I am inclined to accede, that where the estates unite, the equitable must merge in the legal. That was the principle of the opinion of the judges in Goodright v. Wells; and, upon consideration, I am inclined not to lay any restriction upon or to narrow it in any respect, but to hold that, by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either come together or are afterwards united in him, the legal will prevail; the equitable is totally gone for the purpose of being acted upon by any person in this court. Therefore, that being to be laid down universally, this demurrer must be allowed against the plaintiff claiming as heir ex parte paterna."

Upon this authority Chancellor Kent, in Nicholson v. Halsey, 1 Johns. Ch. (N. Y.) 416, holds that this rule may now be "laid down as a settled principle." According to this rule, the legal title to the estate in question is the controlling title. As that title did not come to

[18] In Hopkinson v. Dumas, 42 N. H. 296, 306, 307 (1861), Sargent, J., said of Goodright v. Wells, Douglass, 771 (1781): "It was there learnedly argued that before the Statute of Uses the use was considered, in most respects, as the complete ownership of the land, that the estate of the feoffee was subservient to the cestui que use, and that the former could do nothing to defeat the interest of the latter, unless by alienation for a valuable consideration without notice; that the Statute of Uses completed this subserviency by consolidating the legal estate with the use, or by merging the legal estate in the equitable; and that by analogy to uses thus considered, trust estates had been and should be held to be the solid and substantial ownership of the land, and the trustee the mere instrument of conveyance; that where a party holds by two titles, the law considers him as taking by the best; that the trust estate, being the best, must control the legal estate. But the court held otherwise, deciding that the legal estate was the better title, and that the equitable title was merged the moment the two became united in the same person; that the legal drew after it the equitable estate, and that the latter was lost in the former; so that, upon the death of the son (the person in whom both estates had been united), the estate did not again open, and that the trust could not again be revived."

Alexander Taylor, Jr., by descent, gift, or devise from his parent or other kindred, it must descend and pass to his mother, according to the provisions of Pub. St. R. I. c. 187, § 1. Decree accordingly.[19]

[19] On rehearing in Shepard v. Taylor, 16 R. I. 166, 177, 13 Atl. 105 (1888), Stiness, J., said: "We must reiterate that Alexander, Jr., took nothing under the will. Certainly not by devise, for the will, in terms, gave him nothing. An equitable fee was given to his father, and this he inherited. He then got the legal estate from the trustee, by virtue of his inheritance of the equitable estate, which was a right existing outside and independent of the will. If a stranger had bought the equitable fee of Alexander, Sr., he would equally have been entitled to a conveyance from the trustee. But no one would claim in such a case that he took either by devise or gift under the will, or by gift from the trustee. Whether the word 'gift,' as used in the statute, be taken in a technical or popular sense, it does not cover this case, since Alexander, Jr., took the legal estate independently of the will by virtue of his ownership of the equitable estate, just as a stranger would have done had he become the owner of it. In other words, he acquired the legal estate as a new estate by purchase. The uncles of Alexander, Jr., contend, however, that William H. Taylor did not convey an estate by his deed, but only executed a power of appointment under the will, and hence that Alexander, Jr., took his estate under the will by virtue of the appointment, and not by purchase under the deed. We do not think this is so. The will contained no limitation of an estate in favor of Alexander, Jr., individually or as one of a class, so as to leave the trustee either a direction or discretion when to convey. If it had, undoubtedly the grantee in a deed from the trustee would take under the will by virtue of the limitation in his favor. Neither did the will indicate any intention to give a mere power of appointment. The trustee had no power of selection outside of the ownership of the equitable estate. The estate was devised to him in trust to hold, and in his discretion to convey. This discretion, at most, could only apply to the time and circumstances of the conveyance; and the decision in Taylor v. Taylor, 9 R. I. 119, was to this effect. * * * If, then, Alexander, Jr., inheriting the equitable estate from his father, received the legal estate on that consideration and in execution of the trust, he became the owner of the entire estate neither by gift nor devise from the testator, nor by gift from the [trustee] uncle."

CHAPTER II

PERSONS TAKING BY DESCENT

SECTION 1.—THE WIDOW AS "HEIR"

PEABODY v. COOK.

(Supreme Judicial Court of Massachusetts. Norfolk. 1909. 201 Mass. 218, 87 N. E. 466.)

RUGG, J. This is a petition by the trustee under the will of Isaac Cook for leave to convert certain real and personal estate into cash, and distribute the proceeds to such persons as may be entitled thereto under the provisions of the will. The trustees were directed, by the seventh and eighth clauses of the will, to hold certain real and personal property upon the trust, first, to pay the income thereof to William W. Cook, a grandson of the testator, during his life, and to his wife, Frances A., if she survived him, during her life. The trust was to terminate upon the decease of the survivor of these two, and the trustees were directed as to the property held under clause 7 to thereupon convey the estate "to and among the right heirs at law of said William W. Cook, agreeably to the statutes of Massachusetts regulating the descent of intestate estates, the issue of any deceased child taking its parent's share." As to the property held under clause 8, they were directed to distribute the property "to and among the right heirs at law of the said William W. Cook agreeably to the statutes of Massachusetts regulating the descent and distribution of intestate estates, the issue of any deceased child taking its parent's share." William W. Cook and Frances A. Cook both survived the testator, and subsequently Frances A. Cook deceased, having had five children by William W. Cook, three of whom are now living, the others having died without issue. Thereafter William W. Cook married as his second wife the appellant, Harriet F. Cook, who has borne by him two children, both now living, and who has survived him. William W. Cook died within a year prior to the filing of this petition.

The question presented is whether the second wife, Harriet F. Cook, shares under the provisions of the will of Isaac Cook, or whether the property is to be divided wholly among the children of William W. Cook. If the word "right" had been omitted from the clauses above quoted governing the final distribution of the estate, there would be no question but that the second wife would be entitled to share in the

estate. Rev. Laws, c. 140, § 3, cl. 3, creates a surviving wife a statutory heir of a deceased husband, who leaves issue. It is true that by Rev. Laws, c. 132, § 1, the wife is given the right to waive her inheritance and claim her dower at common law, but we construe this statute to mean that the wife stands upon the same footing respecting the interest in the real estate of a deceased husband, where the deceased leaves a widow and issue, as she does where the deceased leaves no issue, in which event she is given at least five thousand dollars and one-half the remaining real and personal estate. It has been repeatedly held that in the latter event the wife is a statutory heir. She is included among those who take real estate in fee in case of intestacy, which is the familiar definition of heir at law. Proctor v. Clark, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; Smith, Petitioner, 156 Mass. 408, 31 N. E. 387; International Trust Co. v. Williams, 183 Mass. 173, 66 N. E. 798; Holmes v. Holmes, 194 Mass. 552, 559, 80 N. E. 614; Gray v. Whittemore, 192 Mass. 367, 381, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246.

The only doubt arises from the presence of the word "right" before "heirs" in these two clauses of the will. These two words have been adverted to in Brown v. Wright, 194 Mass. 540, 545, 80 N. E. 612, and in Boston Safe Deposit & Trust Co. v. Blanchard, 196 Mass. 35, 81 N. E. 654, but their meaning was not defined in either of these cases. The phrase "right heirs" has been before other courts in several instances, and has generally been held to mean the same as heirs at law. Guerard v. Guerard, 73 Ga. 506, 510; Ballentine v. Wood, 42 N. J. Eq. 552, 9 Atl. 582; Brown v. Wadsworth, 168 N. Y. 225, 61 N. E. 250; Gordon v. Small, 53 Md. 550, 560; Sladen v. Sladen, 3 J. & H. 369; In re Ferguson, 24 Ont. App. 61. See 1 Washburn on Real Property (6th Ed.) § 150. In several English cases it has been said that the words "right heirs" mean the heirs at common law. Garland v. Beverly, 9 Ch. Div. 213, 220; De Beauvoir v. De Beauvoir, 3 House of Lords Cases, 524, 551; Young v. Gibbons, [1902] 1 Ch. 336, 647.

There is ground for argument that, applying the principle of the English cases to the present statutory provisions in Massachusetts in the light of the history of our statutes touching the determination of heirs of persons who decease intestate, the phrase "right heirs" means nothing more than statutory heirs. See, also, Mason v. Baily, 6 Del. Ch. 129, 14 Atl. 309; In re McCrea, 180 Pa. 81, 36 Atl. 412. A difficulty might arise in determining what the common law is (if that interpretation should be adopted) in view of primogeniture under English common law and its early abolition by statute in the colony and province of which this commonwealth is the successor. But it is not necessary to determine whether the phrase under all circumstances necessarily is equivalent to legal heirs or whether it may sometimes have the meaning of heirs by the blood, or possibly some other significance, for it is manifest from the will now under consideration

that the testator intended to have his estate distributed according to the statutes of descent. We need only apply the cardinal rule of will construction, which is to ascertain the intent of the testator and give it effect, unless prevented by some inflexible rule of law.

Attributing to the phrase, "right heirs," standing by itself, the restrictive force claimed by the children of William W. Cook, it is altogether overborne by the emphatic, technically accurate and indisputably clear language of the will immediately succeeding the words, "the right heirs at law of William W. Cook," namely, "agreeably to the statutes of Massachusetts regulating the descent of intestate estates." The testator thus makes plain his intention to incorporate into his will as a part of its terms the statute as to the descent of real estate of an intestate, as it might be at the time the will became operative. "Right" as descriptive of "heirs" is a word unknown in our statutes, which employ only "heirs." If anything beyond the natural sense of the words of the will was needed to reach this conclusion, it is to be found in another portion of clause 7, where, after having provided for the conversion of the entire trust funds thereby created into personal property, in a certain event which did not arise, he proceeds to say that after the death of both Frances A. and William W. Cook the estate should be divided, "to and among the right heirs at law of said William W. Cook, agreeably to the statutes of Massachusetts regulating the distribution of intestate estates," thereby recognizing the difference between the distribution of personal property and the descent of real estate, and specifically providing that such distribution should be according to the statute regulating distribution, although he still employs the phrase, "right heirs." "Right" becomes, in the light of the context in which it is used, at best an adjective of dignity or approval of the legislative determination of the persons who constitute "heirs."

As there is real estate devised by both clauses of the will, the whole property, both real and personal, will go to those who are technically described as heirs, there being no indication that more than one class is intended. Gardner v. Skinner, 195 Mass. 164, 80 N. E. 825. The decree of the probate court is reversed, and a decree should be entered giving one-third of the estate to Harriet F. Cook, the second wife, absolutely, and dividing the rest equally among the five children of William W. Cook. So ordered.[1]

[1] See Smith v. Winsor, 239 Ill. 567, 88 N. E. 482 (1909); Weston v. Weston, 38 Ohio St. 473, 478 (1882). Compare Leavitt v. Dunn, 56 N. J. Law, 309, 28 Atl. 590, 44 Am. St. Rep. 402 (1893).

SECTION 2.—PRETERMITTED HEIRS

In re WARDELL'S ESTATE.

(Supreme Court of California, 1881. 57 Cal. 484.)

McKee, J. Ada Wardell, a resident of the city and county of San Francisco, died February 25th, 1875, leaving, surviving her, her husband, two sons, and a daughter. Before her death, she had made her last will and testament, whereby she disposed of all her real and personal estate to her husband for life, and the remainder to her two sons. No provision was made in the will for the daughter. Her name was not mentioned in it, and it does not appear by anything in the will itself that the omission was intentional. The daughter was born out of lawful wedlock. She had never been legitimated by the subsequent intermarriage of her parents, or by acknowledgment or adoption of her father. Having been omitted from the will, she resisted the disposition of the property made by it, claiming that, as pretermitted heir of her mother, she was entitled to a distributive share in the estate. The probate court recognized the validity of the claim, and in the final distribution of the estate adjudged her to be entitled to the same distributive share in the estate of her deceased mother as though the mother had died intestate.

The sons appealed from this decision, and claim that the daughter of their deceased mother, being an illegitimate child, is not entitled to succeed by testamentary succession to any portion of her estate.

But by section 1307 of the Civil Code it is provided, that "when any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate." In other words, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. Section 1306, Civ. Code. He takes by succession, like one born after the making of the will.

It is contended, however, that the word "children," as used in this section, includes only legitimate children, because it is a rule of construction that whenever Legislatures use a term without defining it, which is well known in the English law, they must be supposed to use it in the sense in which it is understood in the English law; and as the Legislature has made no attempt to define, limit, or qualify the term, or to change in the least its common-law signification, therefore, the term must mean only those born in lawful wedlock.

It is well settled that at common law the word "children" means those born in lawful wedlock; and such, indeed, has been its legal

meaning in every known system of law. Those only were considered as legitimate whose blood was traceable to the legal marriage of a common pair. A person not born in lawful wedlock was not regarded as a member of the group known in law as the family; and consequently was not entitled to the privileges of members of the family, or to any rights of inheritance or succession. Yet every person, whether born in lawful wedlock or not, was recognized as a member of the community, and his relations to the community, and to each member of it, and in respect of the things appertaining to it, were matters which were regulated by law. Indeed, the object of all law is to ascertain and settle the status of individuals in the social system, and to regulate the rights and duties of which each is the center.

In relation to children, the common law was a rule of succession to an estate. No one could succeed to an estate in land who was not born in lawful wedlock. Such continued to be the rigorous rule of that law until the reign of Edward III, when the principle of descent was changed in favor of bastards whose parents afterwards intermarried. This modification of the condition of such children under the common law was effected, as Blackstone says, "by the transcendant power of an act of Parliament." And by the same agency the status of persons who had no rights of inheritance or succession under the common law, has been, under modern law, greatly changed. So that now persons who, as bastards, had no rights of inheritance, are, under the law in most, if not all, of the states of the Union, capable of inheriting and transmitting inheritance. The legal meaning of the word "children" has, therefore, been greatly enlarged from what it was at common law.

If courts were now to restrict the word to its common-law meaning, all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth, would be excluded from rights of inheritance or succession. But by statute law, the offspring of marriages null in law (section 84, Civ. Code), children born out of lawful wedlock whose parents subsequently intermarried (section 215, Id.), and children by acknowledgment or adoption of their father (sections 224, 227, 228, and 230, Id.), are all legitimate. These, although incapacitated at common law from succeeding to any rights of their father, are regarded for all purposes as legitimate from the time of their birth. Between them and the legitimate offspring of the same parents the law has established cognatic relations, and either is as capable as the other of exercising inheritable rights. Hence the term "children," as used in section 1307 of the law of succession, must relate to status, not to origin—to the capacity to inherit, not to the legality of the relations which may have existed between those of whom they may have been begotten. The word has, therefore, a statutory and not a common-law meaning; and its meaning includes all chil-

dren upon whom has been conferred by law the capacity of inheritance.

And the state has regulated the inheritable capacity of all children illegitimate by birth. Those who have not been legitimated by the will of their father, in any of the modes authorized by law, have been rendered capable of inheriting from their mother. By section 1387 of the Civil Code, it is declared that "every illegitimate child is, in all cases, an heir of his mother, and inherits her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock." Speaking of such a law passed by the state of Maryland, Mr. Chief Justice Taney has said: "It seems to have been supposed by the Legislature that, as there could have been no doubt of the relation which the mother bears towards her illegitimate children, the reasons of policy, which must always preclude such children from claiming the inheritance of any one upon the ground that he was their father, do not apply to the property of the mother. To this extent, therefore, the right to inherit is given by the statute; and it would appear to have been given upon the principle that it is unjust to punish the offspring for the crime of the parents."

The respondent was, therefore, though illegitimate by birth, endowed by the statute with inheritable blood. She possessed the same inheritable rights as heir of her mother as if born in lawful wedlock. Rogers v. Weller, 5 Biss. 166, Fed. Cas. No. 12,022; Garland v. Harrison, 8 Leigh (Va.) 368; Bennett v. Toler, 15 Grat. (Va.) 588, 78 Am. Dec. 638. As an heir of her mother, she differed nothing in law from the other children, so far as the rights of inheritance which had been conferred upon her by law. To the full extent of those rights she was entitled to all the privileges and immunities of heirship. If her mother had died intestate, her right to a distributive share of the estate would have been unquestionable. Dying testate, the legal relation between mother and daughter was not impaired or destroyed. The latter was still a legitimate heir, as much so as the children legitimate by birth, for the law made her an heir to the same extent "as if she had been born in lawful wedlock."

It is not to be supposed that the law which attached to her person the rights and duties of inheritance, and endowed her with the capacity to exercise them, meant to leave her a bastard, under the disabilities of the common law, if the mother unintentionally omitted to make provision for her in her will. When placed by law in the state and condition of heir, and invested with the character and capacity of heir, all the rights, privileges, and legal consequences incident to that relation were tacitly conferred upon her. Swanson v. Swanson, 2 Swan, 446. And in the presence of the will of her mother in which her name was omitted, she stood clothed in law with the same rights to inherit as any one of the legitimate children would have stood had he been omitted. The omission did not affect her legal rights, unless it was expressed on the face of the will to have been intentional. But

no such intention appears in the will; the omission was therefore unintentional. Estate of Garraud, 35 Cal. 336; Estate of Utz, 43 Cal. 200; Bush v. Lindsey, 44 Cal. 121. And, as pretermitted heir of her mother, the respondent was entitled to a distributive share of the estate.[2]

Judgment affirmed.

PEET v. PEET et al.

(Supreme Court of Illinois, 1907. 229 Ill. 341, 82 N. E. 376, 13 L. R. A. [N. S.] 780.)

Bill for partition by Henry J. Peet, as guardian ad litem of Telfair B. Peet, a minor, against Jane Creighton Peet and others. * * *

On May 28, 1902, William Creighton Peet made and executed a last will and testament, which; omitting the formal parts thereof, is as follows: "I give, devise and bequeath all my property, wherever situated, to my wife, Jane Creighton Peet." The youngest son of the testator, Telfair B. Peet, was born about 1½ years after the execution of the will. The other son, Creighton Peet, was about 3 years old at the date of the will. Jane Creighton Peet claims the entire half interest in the testator's land in question, while the guardian ad litem of Telfair B. Peet claims that the devise under the will should be abated to raise for the after-born child such a portion of the testator's estate as he would have been entitled to receive if the testator had died intestate. * * *

The circuit court found that Jane Creighton Peet was the owner in fee, under the will, of the real estate of which the testator died seised, and that Telfair B. Peet had no interest whatever in the premises. Telfair B. Peet, by his guardian ad litem, appeals to this court, and

[2] But see Kent v. Barker, 2 Gray (Mass.) 535 (1854). That a child born out of lawful wedlock before the date of its father's will and rendered legitimate by the marriage of its father and mother after the date of the will is not an afterborn child entitled to take as if the father had died intestate is held in Appeal of McCulloch, 113 Pa. 247, 6 Atl. 253 (1886). But compare cases on effect of adoption in note, post, pp. 420, 421.

On a gift in a will to children as applied to illegitimate children, see In re Sander's Estate, 126 Wis. 660, 105 N. W. 1064 (1906); In re Eve [1909] 1 Ch. 796. On the rights of children omitted from a will of their parent, see 9 Prob. Rep. Ann. 3, note; 8 Am. Prob. Rep. 338, note.

Pretermitted heirs include posthumous children. Bowen v. Hoxie, 137 Mass. 527 (1884); Northrop v. Marquam, 16 Or. 173, 18 Pac. 449 (1888). And children born after the execution of the will and before the testator's death. Owens v. Haines, 199 Pa. 137, 48 Atl. 859 (1901); Walker v. Hyland, 70 N. J. Law, 69, 56 Atl. 268 (1903); Watkins v. Watkins, 88 Miss. 148, 40 South. 1001 (1906). As well as children born before the execution of the will and overlooked. On what is a "mention" of children, see Tavshanjian v. Abbott, 130 App. Div. 863, 115 N. Y. Supp. 938 (1909). See, also, note 56, ante, p. 320.

In Hobson v. Hobson, 40 Colo. 332, 91 Pac. 929 (1907), a will was rendered nugatory except as to the appointment of an executor because a posthumous child took one half the estate, as it was not provided for in the will, and the widow elected to take the other half by renouncing the will.

insists that the court erred in refusing to hold that Telfair B. Peet was the owner of an undivided one-fourth interest in the premises described in the bill.

VICKERS, J.[3] Section 10 of chapter 39, Hurd's Rev. St. 1905, provides as follows: "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will." * * *

Second. Appellant's second proposition is that under section 10 of chapter 39 of our statutes no evidence outside the will itself is admissible, and that under said section and the words of the will appellant is entitled to a one-fourth interest in the real estate involved. In so far as the court below permitted parol evidence of the testator's statements, either before or after the making of the will, the ruling is clearly erroneous. The statements of a testator cannot be received to prove what is intended by the written words of the will. Where an issue is raised as to the testamentary capacity of the testator, then what he says and what he does, if not too remote from the time when the will was executed, becomes original evidence and is admissible under the well-established rules of evidence. The erroneous ruling of the court on the admission or exclusion of evidence will not require us to reverse the decree if upon the whole record a proper conclusion has been reached and there is competent evidence in the record sufficient to support the decree.

Appellant insists that section 10 of chapter 39 ex vi termini precludes the court from looking to anything except the words of the will itself. This argument is based upon the phrase, "unless it shall appear by such will that it was the intention of the testator to disinherit such child"; his contention being that the intention of the testator must be expressed in words in the will, and that it is not sufficient that such intention is disclosed by the application of the usual rules of interpretation, especially if, in the application of those rules, parol evidence must be resorted to. This section of the statute was not enacted for the purpose of working a change in the law relating to the construction of wills. Manifestly, it was never intended by the Legislature that wills to which this section applied should be construed by any different rule than other wills to which said section does not apply. In a legal sense, everything pertaining to a testamentary dis-

[3] The statement of facts is abbreviated, and part only of the majority opinion is given.

position of property must appear by the will, but it often becomes necessary to resort to extrinsic evidence to determine what persons or things do, in fact, appear by the will. The language of the will may be such that the court cannot determine with certainty what intention is expressed in the will, but when read in the light of surrounding circumstances the court can clearly see what before was not discernible. It was not discernible, not because it did not appear from the will, but because the reader did not have the aid of the lights furnished by the surrounding circumstances.

By way of illustrating our meaning, take Lord Cheney's Case, 5 Rep. Ch. 69. There the testator had two sons, both baptized by the name of "John." He devised his lands to his son John, without in any way designating which one of them he referred to. When the testator used the name "John" he meant a particular son, but the question was: Which one did he mean? Upon resorting to extrinsic evidence it was shown that the elder John had been long absent and was supposed to be dead, while the younger John was known to be alive at the time the will was made. Now, in the light of these circumstances, it was readily decided that the younger should take the devise.

Another illustration is afforded by the case of Bradley v. Rees, 113 Ill. 327, 55 Am. Rep. 422. There the residuary clause devised all the remainder of the testator's lands "to the four boys." The testator had seven sons, but the parol proof showed that three of them were men, married, and had families of their own, while four of them were minors, residing with the testator. It was held that the testator intended the four minors to have the estate. In these and all like cases where a resort to parol evidence is allowable, it is not for the purpose of importing into the will a new intention not expressed in the will, but for the purpose of enabling the court to determine what the intention in fact is, as expressed by the words of the testator in the will.

We regard the case of Hawhe v. Chicago & Western Indiana Railroad Co., 165 Ill. 561, 46 N. E. 240, as directly in point and conclusive against the contention of appellant on this question. Indeed, we do not see how it would be possible to sustain appellant's contention without overruling that case. There, as here, the will gave all of testator's property, real, personal, and mixed, of every kind whatsoever, to testator's wife. At the time the will was executed the testator had two children, and afterwards a third child was born. There was there, as here, no mention or reference to the children, born or unborn. Parol evidence was admitted there of the same general character that was heard in this case, and in answering the argument made against the admissibility of such evidence this court, on page 564 of 165 Ill., page 241 of 46 N. E., said: "But we do not think the evidence objected to had any tendency whatever to vary or change the intent of the testator as declared in the will. As we understand the record, the evidence was not offered for that purpose. The object of the evidence

was to place before the court the circumstances attending the execution of the will in support of and in aid of the intention of the testator as declared in the will, and the court, in the exercise of its discretion, had the right to hear such evidence. In the discussion of this subject it is said in Schouler on Wills (section 579): 'But to aid the context of the instrument by extrinsic proof of the circumstances and situation of the testator when it was executed is constantly permitted at the court's discretion, and this constitutes a proper—indeed, often an indispensable—matter of inquiry when construing a will, for whatever a will may set forth on its face, its application is to persons and things external, and hence is admitted evidence, outside the instrument, of facts and circumstances which have any tendency to give effect and operation to the terms of the will, such as the names, descriptions, and designation of beneficiaries named in the will; the relation they occupied to the testator; whether the testator was married or single, and who were his family; what was the state of his property when he made his will, and when he died; and other like collateral circumstances. Such evidence, being explanatory and incidental, is admitted, not for the purpose of introducing new words of a new intention into the will, but so as to give an intelligent construction to the words actually used, consistent with the real state of the testator's family and property—in short, so as to enable the court to stand in the testator's place, and read it in the light of those surroundings under which it was written and executed'—citing Little v. Giles, 25 Neb. 313, 41 N. W. 186, and Doe v. Hiscock, 5 Mees. & W. 363."

In commenting on the force of the fact that the testator had two children living at the time the will was made which were in no way referred to or mentioned in the will, this court, in the same case above cited on page 567 of 165 Ill., page 242 of 46 N. E., used the following language: "At the time the will was executed by the testator he had two children then living; one four and the other two years old. These children were excluded from taking any portion of the testator's estate by the will. Is it reasonable to believe that the testator intended to exclude these two infants and not at the same time exclude another child to be born within the next two months after the will was executed? It seems plain, if the testator had intended to make any distinction between his children then born or unborn, he would have inserted a provision in his will manifesting that intention. In order to disinherit appellant the testator was not required to state the fact in express terms in the will. It is enough that the intention appears from the will, upon consideration of all of its provisions."

The same reasoning applies with special force to the case at bar. Let us look at the circumstances. The testator had one child, a bright, intelligent, lovable son, three years old, bearing his father's name, Creighton, and the testimony shows that the testator was devotedly attached to this boy. The testator had retired from business and spent a large part of his time in the company of his son, Creighton. He

owned an estate of heavily incumbered and unproductive lands, which required business ability and expedition in handling the same. The testator had a wife in whose business judgment and ability he had unlimited confidence, and he no doubt believed that her maternal devotion to her children could be relied upon to provide for them out of what might be saved of the estate better than the testator could in the embarrassed and entangled condition of affairs that surrounded the property at the time the will was executed. Surrounded by these circumstances, the testator made his will, employing for that purpose 16 words: "I give, devise and bequeath all my property, wherever situated, to my wife, Jane Creighton Peet." What did the testator mean by giving all his property to his wife? Did he mean that if afterwards a child should be born such child should have one-fourth of the property and the wife three-fourths, and the other child, Creighton, none? In our opinion he meant that his wife should have all of the property, to the exclusion of his children then born or to be thereafter born, and we are much influenced in reaching this conclusion by the circumstances surrounding the testator at the time the will was made, parol evidence of which, under the authority of the Hawhe Case, is clearly admissible in this state.

We freely concede that other courts in other jurisdictions have reached an opposite conclusion with respect to the admissibility of parol evidence under statutes bearing more or less similarity to ours. Perhaps one of the strongest presentations of the opposing view is an opinion of the United States Circuit Court for the District of Nebraska, rendered by Mr. Justice Brewer, in the case of Chicago, Burlington & Quincy Railroad Co. v. Wasserman, 22 Fed. 872. In that case the learned judge felt himself compelled to decide against what he frankly confesses was the real intention of the testator, because, under his view, parol evidence could not aid the difficulty. A quotation from that case is here made merely for the purpose of showing that the rule there applied defeated the intention of the testator: "In this case the primary question I am reluctantly compelled to decide in favor of the complainant, Wasserman. I say reluctantly, for when a man, on the eve of death, having a child five years of age and living with a wife to be delivered of a second child within twenty days, makes a will giving all his property to his wife, I think the common voice will say that he intended no wrong to either the born or unborn child, but trusted to his wife, their mother, to do justice to each, and believed that she, with the property in her hands, could handle it more advantageously for herself and children than if interests in it were distributed. As a question of fact, independent of the statute, I have no doubt that Mr. Wasserman had no feeling either against the born or unborn child, but, having implicit faith in his wife, meant that she should take the entire property, and believed that out of that property and her future labors she would take care of his children. But

the legal difficulty is this: The statute says it must be apparent from the will that the testator intended that the unborn child should not be specially provided for. How can any intention as to this child be gathered from the will alone? It simply gives everything to the wife, is silent as to children. If I could look beyond the will, my conclusion would be instant and unhesitating." Whatever weight this authority might have if this were a case of first impression with this court, it can have none now in the face of our own decision in the Hawhe Case, where the same authority was pressed upon our attention, and this court expressly refused to follow it. This court, on page 569 of 165 Ill., page 242 of 46 N. E., of the Hawhe Case, speaking of the Wasserman Case, said: "While the facts in that case are quite similar to the facts in this case, and the opinion delivered by the eminent jurist seems to sustain appellant's view of the law, we are not inclined to follow it." In the Wasserman Case are collected a number of decisions of other courts upon which appellant relies; but, if the Wasserman Case be rejected as not good law in this jurisdiction, it would seem scarcely necessary to examine in detail the cases upon which it rests.

The appellant relies with some apparent confidence upon Lurie v. Radnitzer, 166 Ill. 609, 46 N. E. 1116, 57 Am. St. Rep. 157, as laying down a different rule from that announced in the Hawhe Case. We do not regard these cases as in conflict. Indeed, the Hawhe Case is cited twice in the Radnitzer Case and relied on as an authority in support of the conclusion reached in the latter case. The cases are clearly distinguishable, and there is nothing said in the later case that in any way impairs the authority of the former.

There is nothing in the New York statute introduced in evidence by appellant, which, considered as a fact in connection with the other surrounding circumstances, will overcome the proofs properly before the court.

It results from what has been said that appellant's second proposition cannot be sustained. The decree of the court below is right, and the same is affirmed.

Decree affirmed.[4]

CARTWRIGHT, FARMER, and DUNN, JJ. (dissenting). The provision of the statute is that a child born to any testator after the making of a will shall not be disinherited unless it shall appear by such will that it was the intention of the testator to disinherit such child. It is not necessary that the testator should expressly declare such inten-

[4] On the admissibility of parol evidence to show whether a living child was intentionally omitted from the will, see 8 Am. & Eng. Ann. Cas. 637, note. That a child is not so omitted where he is not provided for because the scrivener persuades the testator that the omission will not cut off the child's share of his estate is held in Bachinski v. Bachinski, 152 Mich. 693, 116 N. W. 556, 125 Am. St. Rep. 427 (1908). See, also, note 68, ante, p. 224.

tion, but it is sufficient if the will fairly manifests it. In the absence of latent ambiguity, such as the cases referred to in the foregoing opinion, in one of which the testator had two sons named John, and in the other made a devise to "the four boys" when he had seven sons, the intention is to be gathered from the will itself. Hayward v. Loper, 147 Ill. 41, 35 N. E. 225. That rule was stated in Hawhe v. Chicago & Western Indiana Railroad Co., 165 Ill. 561, 46 N. E. 240, as follows: "The law is well settled that extrinsic evidence cannot be resorted to to show the intention of the testator where there is no latent ambiguity in the will, but the intention is to be determined from the language used by the testator in the will itself." Evidence as to the circumstances surrounding a testator at the time the will is made is proper, as an aid to an intelligent construction of the language used, by enabling the court to stand in the testator's place and to read the will in the light of those surrounding circumstances; but, when that is done, it must appear by the will that it was the intention of the testator to disinherit an after-born child, if the will is to have that effect.

The only facts apparent in this case which have any bearing upon the question to be determined are that the testator had one child three years old, for whom he had made no provision in the will, and that he had a wife, to whom he made a simple devise of all his property. By the will itself the testator manifested an intention to give all his property to his wife and to give nothing to the living child; but in our opinion, such facts are entirely insufficient to justify the conclusion reached in said opinion that it appears by the will that it was the intention of the testator to disinherit the child born 1½ years after the execution of the will. We do not regard the decision in the case of Hawhe v. Chicago & Western Indiana Railroad Co., supra, either as conclusive of the question involved in this case, or as fairly tending to sustain the conclusion reached here. In that case the will was made on the afternoon preceding the death of the testator. By it he gave all his estate to his wife. He had two children when the will was executed, and a posthumous child was born about two months after the execution of the will and his death. He made no allusion whatever to his living children or to the one which was soon to be born, and in devising all his property to his wife he used language which the court regarded as very significant of an intention that no other person than his wife should, in any event, have any portion of his estate. It was said that the language used meant more than a simple devise; that language could not have been used which would more clearly express an intention that the wife, and she alone, should take and hold the testator's estate to the exclusion of all others; and that, if the testator had inserted a clause in his will that no other person should have any portion of his estate, such a provision would have excluded the two children then born and the one thereafter to be born, and yet such a provision would not have made the intention of the

testator more definite than the language used. In this case the gift to the wife was an ordinary and simple devise, and one of the controlling reasons for the decision in the Hawhe Case is entirely wanting.

The only other fact regarded as significant in determining the intention of the testator was that he had two children living and knew that another child was to be born within the next two months, and he made no mention of either. The living children were excluded from taking any portion of the estate, and it was not regarded as reasonable to believe that the testator intended to exclude them and not at the same time exclude the other child soon to be born. It is beyond question that the testator there had in mind both his living children and the one that would soon be born, and must have entertained an intention respecting the share which the child, when born, would take in his estate. It was therefore a fair inference that he had the same intention as to all. In this case the child was born 1½ years after the execution of the will, and as it had no existence when the will was made the testator could have had no intention respecting it, different from that which almost every testator might have in executing a will. Eliminating from the Hawhe Case the two facts above referred to, and which formed the basis of the decision, and there would be but little left. We cannot conceive that the decision would have been the same in the absence of such facts.

In the later case of Lurie v. Radnitzer, 166 Ill. 609, 46 N. E. 1116, 57 Am. St. Rep. 157, the testator had a wife and three children, and a posthumous child was born about three months after his death. In his will he devised his entire estate to his wife and the three living children, giving two-fifths to the wife and one-fifth to each of the three children. In the draft of the will he made a devise to his child as yet unborn, and in another place made reference to that child, but before the execution of the will he erased both the devise and the reference. It was held that, although the testator gave his entire estate to the wife and living children and erased the devise to the unborn child, he did not thereby manifest an intention to disinherit such child. The decision was based on the ground that the will contained no negative expressions whatever concerning the unborn child, and the court said: "The mere fact that the testator knew that such child was likely to be born to him, and that he had such knowledge when he executed his will, would not be sufficient, under the statute, to deprive such child of his share in his father's estate." The statement made in this case that the testator, no doubt, believed that the maternal devotion of his wife to her children could be relied upon to provide for them, is not in harmony with what was there said concerning the intention of the testator, as follows: "Had it been his intention, as contended by appellants, that the provision in the will giving his wife two-fifths of his estate should inure also to the benefit of this child if born alive, we would expect to find something in the will to indicate such intention."

We are of the opinion that it does not appear by the will in question in this case that it was the intention of the testator to disinherit the child born 1½ years afterward, which had no existence at the time the will was made.

SECTION 3.—ADOPTED CHILDREN

WAGNER v. VARNER.

(Supreme Court of Iowa, 1879. 50 Iowa, 532.)

Mahala Boyer, daughter of John Bumer, died in 1864, leaving two children, who are the wards of the plaintiff, surviving her. In the same year—but whether before or after the death of said Mahala does not appear—John Bumer adopted said children, as provided by law, and in 1876 died without having made a will. Said Bumer left several other children surviving him. The plaintiff claims that his wards are entitled to inherit a share of the estate of said Bumer, as his children by adoption, and also the share their mother would have been entitled to had she outlived him. The circuit court held that said children could only inherit by reason of their adoption, and rejected the other claim. The plaintiff appeals.

SEEVERS, J. It is provided by statute that the "consent of both parents, if living, and not divorced or separated, and if divorced or separated, or if unmarried, the consent of the parent lawfully having the care and providing for the wants of the child; or if either parent is dead then the consent of the survivor; or if both parents be dead, or the child shall have been and remains abandoned by them," the consent of certain named officers is necessary before the child can be legally adopted. Code, § 2308.

When thus adopted "the rights, duties and relations between the parent and child by adoption shall, thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth." Code, § 2310.

In the absence of a will the estate descends in equal shares to the children of the deceased. Code, § 2453. If one of the children of the deceased "be dead, the heirs of such child shall inherit his share * * * in the same manner as though such child had outlived his parents." Code, § 2454.

Under section 2310 the wards of the plaintiff inherit as the children by adoption of John Bumer, and if Mahala Boyer had outlived him she would have inherited as the natural child of said Bumer, under section 2453; and section 2454 expressly provides that her children shall inherit in the same manner as though she had outlived her father.

There is no escape from this conclusion unless it can be said that the child by the adoption is disinherited by its natural parent.

Because of the adoption the child acquired certain additional rights, but there is nothing in the act of adoption which in and of itself takes away other existing rights, or such as may subsequently accrue, except as is by statute provided.

The argument that these children cannot inherit through their mother leads to this result. Suppose their father after her death consented to their adoption, they could not inherit through their mother or from their father, or through him from a remote ancestor.

By the act of adoption these children became in a legal sense the children of John Bumer. Nevertheless they are the children of their natural parents, and the act of adoption does not deprive them of the statutory right of inheriting from their natural parents, unless there is a statute which in terms so provides. Not only is there no such statute, but we think the contrary is expressly provided.

If, therefore, a child is adopted by a stranger it will inherit from its natural parents, in the absence of a will, because section 2453 of the Code in express terms so provides.

So far we have gone on the supposition that the parents have consented to the adoption. But, as we have seen, such consent in certain contingencies may be given by other persons. Can it be that in such case the child is disinherited by the natural parent without the consent of the latter, in view of the foregoing statutory provisions?

It is said that a child has no natural right to the estate of a deceased parent. Such thought, however, has but little significance in this connection, for the reason that the statutory right is perfect and ample. Nor is the argument that these two children inherit from two sources, and thus get more than their proper share, entitled to much weight. The reply would seem to be pertinent here that heirship is not a natural but a statutory right, arbitrary and general, and, therefore, exceptional cases of apparent hardship or inequality must occasionally occur.

When these children were adopted by John Bumer the effect was to increase, in a legal sense, the number of his children and heirs, and if he died without a will the shares of his natural children were thereby decreased. This was the only effect of the act so far as the right of inheritance was concerned. The rights of his natural children, including Mahala Boyer, in all other respects remained just as they were before. The result is that the judgment of the circuit court must be reversed.[5]

[5] But, contra, that an adopted child cannot inherit from the same person in two capacities, see Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698 (1889); Morgan v. Reel, 213 Pa. 81, 62 Atl. 253 (1905). A child may inherit from both its adoptive and its natural parents. Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788 (1885); Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761, 39

Appeal of WOODWARD.

(Supreme Court of Errors of Connecticut, 1908. 81 Conn. 152, 70 Atl. 453.)

John O. Noxon, a resident of Connecticut, died intestate November 28, 1905. His widow petitioned for administration, setting up that she was the widow, and that the only heir at law and next of kin of the deceased was his sister, Mary L. Woodward. Administration was had, and the court of probate distributed the estate to the widow and one Elizabeth E. B. Potter who had been adopted when two years and seven months of age by the intestate and his wife in Wisconsin. The sister of the intestate appealed from the orders of distribution.

L. R. A. 748, 65 Am. St. Rep. 635 (1898). And from several sets of adoptive parents. Patterson v. Browning, 146 Ind. 160, 44 N. E. 993 (1896). And takes as pretermitted heir. Van Brocklin v. Wood, 38 Wash. 384, 80 Pac. 530 (1905). And even, it seems, as an afterborn pretermitted heir where the adoption comes after the making of the will. Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201 (1902); Sandon v. Sandon, 123 Wis. 603, 101 N. W. 1089 (1905). The adopted child does not as a rule inherit from the ancestral or collateral kindred of its adoptive parent. Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753 (1898); Meader v. Archer, 65 N. H. 214, 23 Atl. 521 (1889); Van Derlyn v. Mack, 137 Mich. 147, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669 (1904); Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am St. Rep. 672 (1906); Burnett's Estate, 219 Pa. 599, 69 Atl. 74 (1908); Boaz v Swinney, 79 Kan. 332, 99 Pac. 621 (1909). See 17 L. R. A. 435, note; 8 L. R. A. (N. S.) 117, note. But in Iowa he may inherit through the adoptive parent. Shick v. Howe, 137 Iowa, 249, 114 N. W. 916, 14 L. R. A. (N. S.) 980 (1908). In Massachusetts the adopted child may inherit from the children of the adoptive parents. Stearns v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441 (1903). But the general rule seems to be the other way. Keegan v. Geraghty, 101 Ill. 26 (1881); Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535 (1890). See, also, 118 Am. St. Rep. 684, note. In Carroll's Estate, 219 Pa. 440, 68 Atl. 1038, 123 Am St. Rep. 673 (1908), a husband adopted a child by proceedings to which his wife was not a party and the child so adopted was held not to inherit from her.

As to whether the blood relatives of an adopted child or its adoptive parents inherit from it, the statutes of the given state must be consulted. In the absence of an express statute giving the adoptive parents the right to inherit, it is held in White v. Dotter, 73 Ark. 130 (1904), Upson v. Noble, 35 Ohio St. 655 (1880), and Hole v. Robbins, 53 Wis. 514, 10 N. W. 617 (1881), that the blood relatives take. In Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788 (1885), an adopted child died intestate without issue, owning real estate which came to it by inheritance from the adoptive mother, and the court held that such real estate descended to the surviving adoptive father, rather than to the child's surviving natural mother. Compare Swick v. Coleman, 218 Ill. 33, 75 N. E. 807 (1905), where there was a statute covering the matter. But see Reinders v. Koppelmann, 68 Mo. 482, 30 Am. Rep. 802 (1878). It has been held that the children of the adopted child will inherit through him the share of the estate of a deceased adoptive parent as fully as if the adopted child were a child by blood. Pace v. Klink, 51 Ga. 220 (1874); Power v. Hafley, 85 Ky. 671, 4 S. W. 683 (1887); Gray v. Holmes, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207 (1896). On whether adopted children are included in bequests to children, see Bray v. Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899); Woodcock's Appeal, 103 Me. 214, 68 Atl. 821, 125 Am. St. Rep. 291 (1907); In re Haight, 63 Misc. Rep. 624, 118 N. Y. Supp. 745 (1909). On adoption in general, see 9 Prob. Rep. Ann. 345, note.

HAMMERSLEY, J.[6] * * * The meaning and effect of the statutory adoption and decree is defined by the [Wisconsin] statute as follows: (1) As affecting the legal rights and duties of parent and child, the adopted child shall be deemed, for the purposes of custody of his person, of power to enforce obedience, and other legal consequences attached to the natural relation of parent and child, as a child of the adopting parent born in lawful wedlock; the natural parent of the child being, by such decree, deprived of all legal rights as respects such child and the child being freed from all legal obligations as respects his natural parent. (2) As affecting the laws of inheritance and distribution and the capacity of the child to take property in pursuance of such laws, the adopted child shall be deemed and taken, for the purposes of inheritance and succession by him, to be the child of his adopting parent. * * *

There is nothing in the policy of this state, in reference to the relation of parent and child, which could interfere with our giving effect to the Wisconsin decree, as respects the rights of the petitioners for the adoption, after they transferred their domicile to Connecticut, or of those claiming under them. We have statutes of a similar nature, and fully recognize the status of an adopted child. Ross v. Ross, 129 Mass. 243, 267, 37 Am. Rep. 321. Those who have once legally made such an adoption cannot shake off the relation by a change of domicile. Whether the child adopted, on reaching full age, could reclaim its original domicile is a question not raised by the facts before us. To John O. Noxon, therefore, after his removal to this state, as well as while an inhabitant of Wisconsin, Elizabeth E. Burton, now Mrs. Potter, stood in the position of a child born in lawful wedlock. * * *

There is no error. In this opinion the other Judges concurred.[7]

[6] The statement of facts is abbreviated, and part only of the opinion is given.

[7] See Finley v. Brown (Tenn.) 123 S. W. 359 (1909). But see Brown v. Finley, 157 Ala. 424, 47 South. 577, 21 L. R. A. (N. S.) 679 (1908). Compare Keegan v. Geraghty, 101 Ill. 26 (1881), where a child adopted in Wisconsin was not allowed to inherit in Illinois from a child of the adoptive parent, because a child adopted in Illinois could not have done so. Compare, also, Olmsted v. Olmsted, 216 U. S. 386, 30 Sup. Ct. 292, 54 L. Ed. —— (1910). On the extraterritorial effect of adoption, see 65 L. R. A. 186, note, and 21 L. R. A. (N. S.) 679, note.

SECTION 4.—ILLEGITIMATE AND LEGITIMATED CHILDREN

THOMAS v. THOMAS' ESTATE.

(Supreme Court of Nebraska, 1902. 64 Neb. 581, 90 N. W. 630.)

HASTINGS, C.[8] The dispute in this case relates to the construction of section 31, c. 23, Comp. St. 1901. The specific question seems to be whether the acknowledgment in writing, signed in the presence of a competent witness, required of the father of an illegitimate child in order to constitute the latter an heir, is simply a provision for written evidence of paternity, or whether it is a requirement of a written instrument signifying an intention of the father to change the status of the child. Plaintiff's petition filed in the county court of Douglas county in Re Estate of John D. Thomas, deceased, alleges that he is the illegitimate child of John D. Thomas; that the latter, about April 8, 1876, in writing, signed in the presence of competent witnesses, acknowledged himself to be plaintiff's father. He asked to be adjudged and considered an heir of the estate of John D. Thomas. The probate court decided against him. He appealed to the district court of Douglas county with the same result, and brings a petition in error to reverse the latter judgment. * * *

If this statute is to be taken as merely requiring a particular form of evidence of paternity in order to render any illegitimate child competent to inherit and only one that shall comply with the bare terms of the law, then the dismissal was erroneous. There was certainly competent evidence of such a writing having been in existence. It is true that, as tendered in proof, this agreement was a mere incident to the settlement with the mother. There is, however, proof given and tendered that there was a writing, signed by John D. Thomas in the presence of witnesses competent to testify, in which he acknowledged himself to be the father of claimant. It is earnestly contended on the latter's behalf that this is all that is required.

In this view counsel are strongly supported by the case of Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. That court is expressly construing this same statute, and holds that olographic letters of the decedent, whose signing was seen by competent witnesses, were a sufficient compliance with the requirements of the law. This conclusion, so far as it rests on the ground that this statute was intended to permit any child born out of wedlock to inherit from his father if he could prove his parentage in this way, was without dissent. * * *

[8] Part only of the opinion is given.

If this statute is to be construed as simply providing for special evidence of paternity, the fact that the writing was never delivered would seem to be without importance. Neither had the will ever been delivered in Remy v. Municipality No. 2, 11 La. Ann. 159. It would not matter who had it if it was simply evidence of paternity. If, however, an intention to change the status of the child is required on the father's part, if the writing was in the nature of a grant of inheriting capacity, and to be effective must evince an intention of the deceased to make the claimant one of his heirs, then his retention of it would show that such intention was imperfect, and that he desired still to retain his control of the matter. The nondelivery of a memorandum sufficient to satisfy the statute of frauds is held to vitiate it, for the reason that it shows an imperfect execution, and to pass rights there must be such a delivery as places the instrument beyond the control of the maker. Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22. If, as defendants in error claim, an instrument for the express purpose of acknowledging the claimant was necessary, he has no right. * * *

In Nebraska the first territorial Legislature adopted the Iowa statute that an illegitimate child should inherit from one who should acknowledge him as a child, but such recognition must have been general and notorious, or else in writing. Laws 1855, p. 75. In 1856 another statute was passed allowing illegitimate children to inherit only on the intermarriage of the parents and the father's acknowledgment of parentage. Laws 1856, p. 125. In 1860 the present law was enacted. Laws 1861, p. 64. As shown in the California cases, the question here is one of construction. It would seem that the common law on this subject is pretty thoroughly eliminated in Nebraska. There are some few cases in this country which adopt the rule that in passing upon the rights of illegitimate children to inherit a strict construction must be followed, as all such rights are statutory. At common law the illegitimate, like the alien, had no heritable blood.[9] The construction as

[9] "By the law [the common law] a bastard was nullius filius as to the whole question of inheritance. He had no mother, or father, no brothers, sisters, or other kindred—no inheritable blood, and hence no capacity to inherit or transmit inheritance, save to the heirs of his own body. The supposed origin of this rule has been asserted to be the discouragement of a promiscuous and illicit intercourse between the sexes. It is at least debatable whether precisely the opposite policy, conferring equal rights of inheritance upon legitimate and illegitimate offspring, would not better preserve the high moral duty of chastity between the sexes." Somerville, J., in Butler v. Elyton Land Co., 84 Ala. 384, 390, 4 South. 675, 677 (1887).

The statutes of most states allow a bastard to inherit from his mother, and allow bastards born of the same mother to inherit from each other. Because the statutes vary in wording and the courts vary in strict or liberal construction, it is hard to lay down rules. In the absence of an express provision in the statute permitting it, such statutes have usually been construed not to allow the bastard to inherit from his mother's ancestors: Jackson v. Jackson, 78 Ky. 390, 39 Am. Rep. 246 (1880); Waggoner v. Miller, 26 N. C. 480 (1844); Brown v. Kerby, 9 Humph. (Tenn.) 460 (1848). But see McGuire v. Brown, 41 Iowa, 650 (1875). And compare Jackson v. Hocke, 171 Ind. 371, 84 N. E. 830 (1908). Or from his mother's collateral kindred. Pratt v. At-

to the alien is that, unless he is expressly mentioned, he has no part in statutes of descent. Stemple v. Herminghouser, 3 G. Greene (Iowa) 408; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Orr v. Hodgson, 4 Wheat. 453, 4 L. Ed. 613.

The rights of illegitimate children have sometimes been treated in the same way. Pina v. Peck, 31 Cal. 359; Furguson v. Jones, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808. In Hunt v. Hunt, 37 Me. 333, in construing this same statute, the court says: "Who are entitled to inherit as heirs of a deceased person is in this state to be determined only by the provisions of the statute in force at the time of his decease. No rules of the civil or common law afford them the least aid." Generally, the courts hold that statutes for the relief of illegitimate children should have at least a fair construction. In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553; Swanson v. Swanson, 32 Tenn. 446. Even the alien, when expressly mentioned, is given whatever the statute clearly calls for. It is to be noted that the statute merely calls in this instance for an "acknowledgment" of a fact. It makes the illegitimate child "an heir of the person who shall, in writing signed in the presence of a competent witness, have acknowledged himself to be the father of such child."

If no more is asked of this son than the statute by its terms requires, he is entitled to a share of his father's estate if the evidence given and offered on his behalf is true. Whether or not it is true, he is entitled to have a jury decide if this statement of his father's is required merely as evidence of his paternity. Such we conclude it is. The question which was not decided in Lind v. Burke, 56 Neb. 785, 77 N. W. 444, it seems to us should be decided in the negative. No intention or desire that the child should become an heir seems needed if his father is pointed out by an acknowledgment of the paternity in

wood, 108 Mass. 40 (1871); Turnmire v. Mayes (Tenn.) 114 S. W. 478 (1908); Reynolds v. Hitchcock, 72 N. H. 340, 56 Atl. 745 (1903). But see Moore v. Moore, 169 Mo. 432, 69 S. W. 278, 58 L. R. A. 451 (1902). Or from his legitimate half brothers or sisters. Bacon v. McBride, 32 Vt. 585 (1860); Woodward v. Duncan, 1 Cold. (Tenn.) 562 (1860); Overton v Overton, 123 Ky. 311, 96 S. W. 469 (1906); Truelove v. Truelove, 43 Ind. App. 734, 86 N. E. 1018 (1909). But see Messer v. Jones, 88 Me. 349, 34 Atl. 177 (1896), where the children of an illegitimate child took by right of representation their father's share of his legitimate half sister's estate. That an illegitimate child takes under a gift in a will to the "heirs by blood" of the mother is held in Hayden v. Barrett, 172 Mass. 472, 52 N. E. 530, 70 Am. St. Rep. 295 (1899). On illegitimate child taking as a child under a will, see In re Eve, [1909] 1 Ch. 796; In re Sander's Estate, 126 Wis. 660, 105 N. W. 1064 (1906). On conflict of laws as to legitimacy, see 65 L. R. A. 177, note. Finley v. Brown (Tenn.) 123 S. W. 359 (1909) and Olmsted v. Olmsted, 216 U. S. 386, 30 Sup. Ct. 292, 54 L. Ed. — (1910). On inheritance by, through, or from bastards, see McSurley v. Venters, 104 S. W. 365, 31 Ky. Law Rep. 963 (1907); Berry v. Powell, 47 Tex. Civ. App. 599, 105 S. W. 345 (1907); In re De Cigaran's Estate, 150 Cal. 682, 89 Pac. 833 (1907); 23 L. R. A. 753, note; 56 Am. Dec. 263–266, note; 13 Prob. Rep. Ann. 375.

the latter's own hand, signed in the presence of a competent witness. Neither does it seem that the court should add to this statute any requirement of delivery of this evidence, or that it be expressly mentioned that the child is illegitimate, or that the witness attest the writing. The statute might require all this, but by its terms does not. * * *

It is therefore recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.[10]

SECTION 5.—THE MURDERER OF THE ANCESTOR

WELLNER et al. v. ECKSTEIN et al.

(Supreme Court of Minnesota, 1908. 105 Minn. 444, 117 N. W. 830.)

LEWIS, J.[11] On January 6, 1899, and for some years prior thereto, John Wellner and Emelie Wellner were husband and wife and residents of the county of Nicollet. On the day named he died intestate, the owner of a farm, of which 80 acres was their homestead, leaving him surviving his widow, Emelie Wellner, and two minor children, the plaintiffs herein. Thereafter such proceedings were duly had and taken in the probate court of the county of Nicollet that a final decree was duly made and entered by and in such court on November 11, 1899, whereby the homestead was duly assigned to the widow for her life, with an undivided one-third of the remainder of the real estate in fee, and the balance thereof to the two children. The deceased

10 But in Nebraska acknowledgment must be direct, unequivocal, and unquestionable. Moore v. Flack, 77 Neb. 52, 108 N. W. 143 (1906).

"While no formal acts are prescribed by the statute which shall constitute the acknowledgment [of the child as the father's offspring] required, undoubtedly the recognition of parentage must be unambiguous. But, if so, such recognition may be shown by conduct, as well as by declarations." Braley, J., in Houghton v. Dickinson, 196 Mass. 389, 391, 82 N. E. 481 (1907). See, also, Miller v. Pennington, 218 Ill. 220, 75 N. E. 919, 1 L. R. A. (N. S.) 773 (1905), holding that an oral acknowledgment is enough where the statute does not require a writing. In some states, the consent of the wife is required to make the acknowledgment effective, and it has been held that to give such consent she must first know that the child is her husband's illegitimate offspring. Estate of Heaton, 135 Cal. 385, 67 Pac. 321 (1902). It has been held that a child once acknowledged cannot be disowned, because a legal relationship, and not a blood one, is to be established. Binns v. Dazey, 147 Ind. 536, 44 N. E. 646 (1896). In Allison v. Bryan, 21 Okl. 557, 97 Pac. 282 (1908), a father was awarded the custody of his illegitimate minor child against its mother, where under the statute he had legitimatized it.

11 A few slight omissions are made in each opinion.

was murdered by his wife and hired man that they might marry each other and enjoy his property, and they were married on June 26, 1900, and on July 5, 1902, they executed for a valuable consideration a quitclaim deed of the land, so decreed to Emelie Wellner by the probate court, to the defendant Joseph A. Eckstein, who then had full notice and knowledge of the facts herein stated. Thereafter each of the grantors in the quitclaim deed were duly convicted of the crime of murdering John Wellner, and sentenced to life imprisonment. On April 6, 1907, the minor children, by their guardian, brought this action in the district court of the county of Nicollet, alleging in their complaint the foregoing facts, to secure a decree adjudging that the defendants hold the legal title to such interest in the lands as was decreed by the probate court to Emelie Wellner as trustee ex maleficio for the benefit of the plaintiffs, and that they are the owners thereof. The defendants demurred to the complaint, and the trial court made its order, from which the plaintiffs appealed, sustaining the demurrer on the ground that the facts stated in the complaint were not sufficient to constitute a cause of action. * * *

Two principal questions are presented by the appeal: (1) What is the proper construction of the state statutes with reference to the descent and distribution of the real property of an intestate, the surviving widow having murdered her husband for the purpose of acquiring the property? (2) The probate court having exercised its jurisdiction in administering the estate, and having made its final decree assigning the property to the widow and children, has the district court jurisdiction as a court of equity to set aside or modify the judgment of the probate court, whether the statute be strictly construed or be read with the implied exception that it has no application to one who has murdered the ancestor for the purpose of benefiting thereby? * * *

A majority of the court are of the opinion that the entire matter is within the jurisdiction of the probate court, and the order appealed from is affirmed upon that ground.

START, C. J. I concur in the conclusion that the order appealed from must be affirmed solely for the reasons following:

The precise question presented by the record is: Did any beneficial interest in the land of her deceased husband ever vest in Emelie Wellner, by reason of the fact that she was his wife and that he died intestate, having been feloniously murdered by her, leaving her his surviving widow? A determination of the question involves a construction of the statutes of the state relating to the descent and distribution of the property of intestates, the effect of the final decree of the probate court assigning to the widow the use of the homestead and one-third of the balance of the land of which her husband died seised, and the claim that in any event she took no beneficial interest in the land, but held the legal title as trustee ex maleficio for the plaintiffs.

1. The descent and distribution of the property of a decedent is a matter within the exclusive control of the Legislature, which may give or withhold the right to inherit upon such conditions as it deems just, and if the legislative intention as to such matter is expressed in clear and unambiguous language there is no room for construction, and effect must be given to the statute as it reads. The provisions of our statute relating to descent and distribution, so far as here relevant, are, and were at the time of Wellner's death, substantially as follows: Whenever any person dies seised of any lands or interest therein, not having lawfully devised the same, the homestead of the decedent shall descend to the surviving spouse, free from any testamentary or other disposition thereof not consented to in writing, for life if there be any children or issue of a deceased child. The surviving spouse shall also inherit an undivided one-third of all other lands of which the decedent was seised at any time during coverture, to the disposition of which by will or otherwise the survivor shall not have consented in writing. Rev. Laws 1905, §§ 3646–3648.

It is to be noted that the statute is specific and clear, and has prescribed the exact conditions upon which the surviving spouse shall be entitled to share in the land of a decedent. If it had been the intention of the Legislature to impose on such right a further condition or exception to the effect that no one should, by virtue of the statute, take or inherit property from a decedent whom he had murdered, it would have been a very easy matter to have expressly provided for such a contingency.

It is, however, urged that to permit one to inherit from an ancestor or spouse whom he has murdered would be so abhorrrent and repugnant to natural law and justice that it must have been the intention of the Legislature to make such a case an exception to the positive provisions of the statute, and therefore the exception will be implied, and the statute construed as if it so read. It is the settled doctrine of this court that the general terms of a statute are subject to implied exceptions, founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences. Duckstad v. Board of Co. Com'rs, 69 Minn. 202–206, 71 N. W. 933; Baart v. Martin, 99 Minn. 197–211, 108 N. W. 945, 116 Am. St. Rep. 394.

This rule of construction, however, applies only to cases where it is clear from all the provisions of the statute that the omission of the exception by the Legislature was unintentional, and an intention to include it may be fairly inferred from all of the provisions of the statute. In every case the question is, what was the intention of the Legislature, as disclosed by the language of the statute? State ex rel. Utick v. Board of Co. Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

The exception which counsel for the appellants insist should be read by implication into the statute in this case is of such a character

that no inference can be fairly drawn from the language of the statute that the Legislature intended to include it therein. This conclusion is sustained by the great weight of judicial authority.

The only case directly holding to the contrary, so far as I am advised, is Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, the reasoning of which was approved in Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540, wherein it was held that the general terms of statutes regulating the devolution of property and the making and effect of wills are subject to the implied exception or condition that one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered, thereby reading into such statutes an exception found in the civil law and also in the Code Napoleon.

It is to be noted that this case did not involve the construction and effect of a statute of descent, but involved only the question whether a devisee could take title to property under the will of a testator whom he had murdered to prevent a revocation of the will and to obtain the immediate possession of the property. It is not difficult to distinguish the cases, for there is a clear distinction between a case where the title passes unconditionally by operation of the positive law of the state and one in which the title passes by the voluntary act of the testator.[12]

The case of Carpenter's Estate, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765, in its facts is substantially like the one at bar. It was a case where a son murdered his father, and it was held that such fact would not justify the court in disregarding the statutes of descent and distribution, by which the son inherited as heir of his father. The court in its opinion reviewed the case of Riggs v. Palmer, declined to follow it, and said: "In the case now under consideration it is asked by the appellant that this court shall decree that

[12] "The cases relied on by plaintiffs in error as authorities against the right to inherit are those involving insurance policies, wills, and the like. Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819; Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540; Lundy v. Lundy, 24 Can. Sup. Ct. 650; Life Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Schmidt v. Northern Life Ass'n, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458. There is a manifest difference, however, between private grants, conveyances, and contracts of individuals and a public act of the Legislature. It might be that a person would not be permitted to avail himself of the benefits of an insurance policy the maturity of which had been accelerated by his felonious act. Many considerations of an equitable nature might affect the operation or enforcement of a grant or contract of a private person which would have no application or bearing on a statute enacted by the Legislature. So far as the descent of property is concerned, the courts are practically unanimous in holding that all the power and responsibility rests with the Legislature. They have spoken with one voice in opposition to the exclusion of an heir from taking an estate on account of crime, where the statute in plain terms designates him as one entitled to inherit." Johnston, C. J., in McAllister v. Fair, 72 Kan. 533, 537, 84 Pac. 112–114, 3 L. R. A. (N. S.) 726, 115 Am St. Rep. 233 (1906).

in case of the murder of a father by his son, the inheritable quality of the son's blood shall be taken from him, and that his estate under the statute of distribution shall be forfeited to others. We are unwilling to make any such decree, for the plain reason that we have no lawful power so to do. The intestate law in the plainest words designates the persons who shall succeed to the estate of a deceased intestate. It is impossible for the courts to designate any different person to take such estate without violating the law. We have no possible warrant for doing so. The law says, if there is a son, he shall take the estate. How can we say that, although there is a son, he shall not take, but remote relations shall take, who have no right to take it, as there is a son? From what source is it possible to derive such a power in the courts? It is argued that a son who murders his own father has forfeited all right to his father's estate, because it is his own wrongful act that has terminated his father's life. The logical foundation of this argument is and must be that it is a punishment for the son's wrongful act. But the law must fix punishments. The court can only enforce them. * * * It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained, when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that upon the death of a person his estate shall invest in his children in absence of a will, how can any doctrine or principle or other thing called 'public policy,' take away the estate of a child and give it to some other person? * * * There can be no public policy which contravenes the positive language of a statute."

In the case of Shellenberger v. Ransom, 31 Neb. 61, 47 N. W. 700, 10 L. R. A. 810, 28 Am. St. Rep. 500; Id., 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564, the facts were that a father murdered his daughter for the purpose of possessing himself of her estate as her only heir at law. The father was indicted for such murder, and to secure his attorneys for defending him he conveyed to them his interest in his daughter's estate. He was convicted, but while under sentence of death for his crime he was hanged by a mob. The court upon the original hearing of the case held, following Riggs v. Palmer, that the estate of the daughter did not pass, upon her death, to her father, for the reason that a person cannot take, by the statutes of descent, the estate of a person whom he murders for the purpose of possessing such estate. But the court on a rehearing of the case receded from its first decision, and held that by virtue of the plain and unambiguous provisions of the statute of descent, which left no room for construction or interpretation, and by operation of the statute, title to the property in controversy vested eo instanti in the father upon the death of his daughter intestate, without reference to the cause or manner of

her death. In so holding the reasoning of the court was substantially as follows: "In our statute of descent there is neither ambiguity nor room for construction. The intention of the Legislature is free from doubt. * * * The majority opinion in Riggs v. Palmer, as well as the opinion already filed in this case, seems to have been prompted largely by the horror and repulsion with which it may justly be supposed the framers of our statute may have viewed the crime and its consequences. This is no justification to this court for assuming to supply legislation, the necessity for which has been suggested by subsequent events. * * * Neither the limitations of civil law nor the promptings of humanity can be read into a statute from which they are absent, no matter how desirable the result to be obtained may be. The well-considered cases warrant the pertinent conclusion that when the Legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes judicial tribunals to remain silent. * * * Riggs v. Palmer is the manifest assertion of a wisdom believed to be superior to that of the Legislature upon questions of policy."

It was held by the Supreme Court of Ohio in Deem v. Milliken, 53 Ohio St. 668, 44 N. E. 1134, affirming the reasoning of the court below (6 Ohio Cir. Ct. R. 357), that a statute of descent, clear in its terms, cannot, upon grounds of public policy or otherwise, be so construed as to exclude one, who murders his intestate for the purpose of succeeding to his estate, from the inheritance. The facts in that case were that a son, who was sole heir at law of his mother, murdered her for the purpose of succeeding to the title of her land, upon which he gave a mortgage to a third party. He was afterwards convicted of the crime and hanged. The action was between the brothers and sisters of the deceased and the mortgagee; the plaintiffs claiming that no interest in the land of the intestate descended to the son by reason of his crime. The court, in overruling this contention, stated that: "No inference favorable to the plaintiffs in error can be drawn from the supposed familiarity of the lawmakers with the principles of the civil law, where, by an exception, they who murder their ancestors are excluded from the inheritance. The natural inference is that when they incorporated the general rule into the statute, and omitted the exception, they intended that there should be no exception to the rule of inheritance prescribed."

It was held in the case of Owens v. Owens, 100 N. C. 240, 6 S. E. 794, that a wife who was accessory before the fact to her husband's murder did not thereby forfeit her right to dower in his estate, given to her by the laws of the state.

In Kuhn v. Kuhn, 125 Iowa, 449, 101 N. W. 151, it was held that a widow, who was the murderer of her husband, was nevertheless entitled to the distributive share of his estate given in general terms by the statute of descent. Anent the claim that it would be contrary to public policy to permit a person to derive an advantage from his crim-

inal act the court said: "But the public policy of a state is the law of that state as found in its Constitution, its statutory enactments, and its judicial records. * * * And when public policy touching a particular subject has been declared by statute, it is limited by such statute, and the courts have no authority to say that the Legislature should have made it of wider application."

See, also, Murphy v. Renner, 99 Minn. 348, 109 N. W. 593, 8 L. R. A. (N. S.) 565, 116 Am. St. Rep. 418, where it was held that although a wife had abandoned her home, her husband and her children, and was living an adulterous life, an attempted conveyance of his homestead by the husband without her signature was void.

Upon principle and authority I am of the opinion that the terms of our statutes of descent and distribution are so clear, precise, and mandatory that there is no room for construction; that such statutes mean what their language imports, and nothing more; and, further, that by operation of law, independent of any act or volition on the part of Mrs. Wellner, the legal title to and the entire beneficial interest in the property here in question vested in her, subject to the claims of creditors, if any, upon the death of her husband intestate. Noon v. Finnegan, 29 Minn. 418, 13 N. W. 197; Jenkins v. Jenkins, 92 Minn. 310, 100 N. W. 7.[18]

2. If, however, there could be any fair doubt as to such conclusion, the doubt has been forever set at rest by the final decree of the probate court. This is so conclusively settled by the decisions of this court that any extended argument in its support is unnecessary. * * *

Now in this case the construction of our statute of descent—that is, whether it was subject to the implied exception contended for—and the further question whether the widow, by reason of her crime, should be declared a trustee ex maleficio, and the estate of the decedent assigned accordingly, were matters to be determined by the probate court. It follows that its decision thereon, by its decree of distribution, is final and conclusive, for, while our probate courts are not possessed of general equity powers, yet as to all matters of which they have exclusive original jurisdiction by virtue of the Constitution they possess all powers, whether legal or equitable, which are essential to the exercise of such jurisdiction.

3. It is further claimed by plaintiffs' counsel that, if it be conceded that the legal title to the property in question vested in the widow by virtue of the statute, yet by reason of her crime she took no beneficial interest therein, and that equity will hold her as a trustee ex maleficio of the property for the use and benefit of the plaintiffs, the minor children of the decedent. The concession defeats the conclusion, for equity follows the law, and where, as in this case, the legal title to prop-

[18] Another case allowing the murderer to inherit is De Graffenreid v. Iowa Land & Trust Co., 20 Okl. 687, 95 Pac. 624 (1908).

erty vests, not by the act or contract express or implied, of the parties, but by the operation of a positive statute, which has been given effect by a final judgment of a court of competent jurisdiction, the owner of such a title cannot be charged as a trustee ex maleficio. Where a party by force, fraud, crime, or in any other unconscientious manner, secures the legal title to property which equitably belongs to another, or in which he has some interest, absolute or contingent, equity will impress a constructive trust upon the property and charge the holder of the legal title as a trustee ex maleficio for the party who has the beneficial interest therein. Nester v. Gross, 66 Minn. 371, 69 N W. 39.

This rule, however, can have no application to the precise facts of this case, and no court, so far as I am advised, has ever applied it to a case like this one. The distinction between this case, where the legal title vested solely by statute, and the cases cited on behalf of the plaintiffs, in which the property rights claimed grew out of a contract, express or implied, or arose from the fraud or wrong of the alleged trustee with reference to the property, is obvious. So clearly marked is the distinction between the cases that it never occurred, it would seem, to the able courts whose decisions have been referred to that it could be seriously claimed by any one that the doctrine as to trustees ex maleficio could be applied to a case where the title vested by statute, for no reference is made to the claim in the opinions.

In none of the cases cited and relied upon by counsel for plaintiffs did the legal title vest by statute, but nearly all of them involved the effect to be given to wills or life insurance policies. Where a testator by his will devises property to another, it is a reasonable and permissible construction of the will to hold that the devise was upon the implied condition that the devisee should not murder the testator, for manifestly such was the intention of the testator. Therefore, when the devisee murders the testator, there is a breach of the implied condition upon which the devise was made, and the devisee will not be permitted to take the gift. Page on Wills, § 687; 1 Underhill on Wills, § 160.

The same principle applies to a case where a testator disinherits his heir by his will, and thereby gives his property, upon his death, to another, but repents and intends to revoke his will, and to prevent the revocation the legatee murders him; also to a case where a party gives his promissory note payable at a specified time after his death, and the payee or his indorsee feloniously kills the maker, and to cases where the beneficiary in a life insurance policy, or his assignee, murders the insured. An examination of the cases relied upon by the plaintiff shows that not one of them is a case where the legal title vested by statute, but all of them are in their facts analogous to the suggested cases, where the doctrine contended for by plaintiffs' counsel unquestionably applies.

But in this case neither the widow nor her grantee are asking or claiming anything from a court of equity. The absolute title to the property in question vested in the widow by virtue of the statute. Her children never had any interest therein, and her crime did not and could not deprive them of any property rights. Nor did she receive the property as a gift or bounty from her husband, for he could not have disposed of it by deed or will, or otherwise, without her written consent. Solely by operation of the statute the absolute title to the property in question vested in her. There is, then, no basis for charging her as trustee ex maleficio and decreeing the property to the children. To hold otherwise would be the setting aside of the positive written law of the state, the annulling of a final judgment of a court of competent jurisdiction giving effect to the statute, and the forfeiture of an estate as punishment for a crime, contrary to the mandate of our Constitution.

This conclusion is regrettable, but it inexorably follows from the facts in this particular case. The law ought to be otherwise, but the remedy rests with the Legislature.

BROWN, J. I concur in the views of the CHIEF JUSTICE.

ELLIOTT, J. (dissenting). The decision of the majority to the effect that the decree of the probate court is conclusive seems to infer general equity powers in that court which I had not supposed it to possess. I am obliged to dissent from the conclusion that Mrs. Tanke's title to this land rests upon the decree of distribution, and that she thereafter is personally immune from the controlling power of courts of general equity jurisdiction. As I believe that this court has power to dispose of the case upon its merits, I feel justified in stating the doctrines which in my judgment should control.

A decision which allows a murderer to inherit property from his victim shocks the moral sense of all right-feeling people, and that fact in itself strongly suggests that it is wrong in law, morals, and justice. Only the express mandate of the Legislature will justify a court in reaching such a conclusion, and such mandate I do not find in the statute. In its absence no court having at its command the principles and doctrines of equity jurisprudence is justified in confessing impotence and inability to prevent the successful consummation of such a wrong. The statute is in general terms and controls the devolution of property under ordinary normal conditions. The Legislature has not said that a wife who murders her husband shall not inherit his property; neither has it said that a wife who murders her husband shall inherit his property. It has said that a widow shall inherit a certain proportion of the property of her deceased husband, and it in my judgment leaves such exceptional and extraordinary cases as the present to be determined by fundamental principles which for generations have been established in our jurisprudence.

There are but few authorities upon the exact question, and they are conflicting. It is a remarkable fact that all the cases of this charac-

ter have arisen in this country, where human life is said to be held less sacred than in other parts of the civilized world. The first case, that of Owens v. Owens, 100 N. C. 240, 6 S. E. 794, arose in 1888, and it was held that a widow, who had been convicted as an accessory before the fact of the murder of her husband and confined in the state prison under sentence therefor, was entitled to dower in her husband's lands because the statute which gave a legal dower contained no provision for its forfeiture in the event that she murdered her husband. The court felt that it was bound by the literal language of the statute and had no power to read therein an exception which was not expressed in the language. The same conclusion was reached in Deem v. Milliken, 53 Ohio St. 668, 44 N. E. 1134; Id., 6 Ohio Cir. Ct. R. 357; Carpenter's Estate, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765, Williams, J., dissenting; and Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564, reversing a former decision in the same case (31 Neb. 61, 47 N. W. 700, 10 L. R. A. 810, 28 Am. St. Rep. 500). The Pennsylvania case was approved extrajudicially in Holdom v. Ancient Order, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183.

On the other hand, the New York Court of Appeals, in Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, Gray, J., dissenting, held that, in enacting a general law providing for the devolution of property by will or descent, the Legislature could not have intended that the provisions should operate in favor of one who murdered his ancestor or benefactor in order to speedily come into possession of his estate either as devisee, legatee, or heir at law. The Legislature, when it used general language, could not have intended, says Judge Earl, that a murderer should inherit the property of his victim, and, "besides, all law, as well as contracts, may be controlled in their operation and effect by general fundamental action of the common law. No one shall be permitted to profit by his own fraud, nor to take advantage of his own wrong, nor to found any claim upon his own iniquity, nor to acquire property by his own crimes. These maxims are dictated by public policy, have their foundation in universal law, administered in all civilized countries, and have nowhere been superseded by statute." This decision was approved in the subsequent case of Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540.

The same conclusion was reached by the Supreme Court of Ontario in McKinnon v. Lundy, 24 Ont. Rep. 132, affirmed in 24 Can. S. Ct. 680, and by the Supreme Court of Missouri in the recent case of Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641, 16 L. R. A. (N. S.) 244, 123 Am. St. Rep. 510, where it was held that the word "widower," as used in the statute, would not be construed to include a person who has made himself a widower by murdering his wife. In re Kuhn's Estate, 125 Iowa, 449, 101 N. W. 151, it was held that the statute (Code, § 3386), which provided that "no person who feloni-

ously takes, or causes or procures another so to take, a life of another, shall inherit from such person or take by devise or legacy from him any portion of his estate," did not deprive a widow who was the murderer of her husband of her distributive share of his estate, which came to her under section 3366 as a matter of contract. The statute was subsequently amended so as to bring the surviving spouse within its terms.

I am not impressed by the supposed difficulties in the way of so construing this statute as to exclude a case of this character. The books are full of cases in which such construction has been resorted to, and the principle applied is neither novel nor extreme. The idea that the Legislature will not be presumed to have intended to legislate unjustly early found expression by the writers on the common law, and Dwarris drew from Plowden and Coke the maxim of interpretation that, "when statutes are made there are some things which are exempted and foreprized out of the provisions thereof by the law of reason, though not expressly mentioned; thus things for necessity's sake or to prevent a failure of justice are excepted out of statutes."

The courts have naturally and properly always striven to prevent injustice which would otherwise result in individual cases from the linguistic shortcomings of legislators. The limitations of language are such that it is practically impossible to so phrase a Code or statute as to provide for all the manifold conditions and the possible emergencies which result from human activities. But justice must be presumed to be the ultimate purpose which the Legislature had in mind, and, as said by a recent writer, "whenever the written law plainly contradicts the precepts of justice, so inwoven into our natures as to seem instinctive, a doubt will be made whether the Legislature really intended what it seems to have declared." Carter on Law, Its Origin, Growth, and Functions, p. 282. When a literal construction would result in an unjust, inequitable, and absurd conclusion, it is always held that the general language of the statute should not be so construed as to produce such a result. A statute should be construed in the light of the fact that there are many other rules and principles of law and equity, the existence of which were known by the Legislature and the application of which may restrict its general language.

In Cleaver v. Mutual Life Ins. Co., 1 Q. B. 147, which grew out of the famous Maybrick Case, it appeared that Mrs. Maybrick had murdered her husband and that his executors claimed the proceeds of certain life insurance policies as against the assignees of the widow. The policy contained no exceptions which covered the case, and the married women's act of 1882 allowed a person to name his wife as beneficiary in a life insurance policy and create a trust in the proceeds in her favor. It was held that the wife by murdering her husband had rendered the trust incapable of performance. In the course of the decision Lord Justice Fry remarked that the language creating a trust must "be subject to the principle of public policy, * * * and the

language of the statute must be read as though it contained an exception in such a case."

Numerous cases illustrate the fact that the ultimate rights of parties are not always measured by the strict and literal language of a statute. A party's conduct may prevent him from availing himself of an apparent right given by a statute. Connivance will bar the right to a divorce, although not so provided in the statute. Lee v. Hammond, 114 Wis. 559, 90 N. W. 1073; Pierce v. Pierce, 3 Pick. (Mass.) 299, 15 Am. Dec. 210; Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. St. Rep. 488; Wilson v. Wilson, 154 Mass. 194, 28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237, and cases cited in note. In equity it is the settled rule that the fraudulent concealment through some artifice or act of a cause of action will prevent the running of the statute of limitations. 25 Cyc. 1214; Blair v. Bromley, 5 Hare, 542; Moses v. St. Paul, 67 Ala. 168; Allen v. Conklin, 112 Mich. 74, 70 N. W. 339; Lieberman v. Wilmington Nat. Bank, 2 Pennewill (Del.) 416, 45 Atl. 901, 48 L. R. A. 514, 28 Am. St. Rep. 414. The same rule prevails generally in actions of law. Shelby County v. Bragg, 135 Mo. 291, 36 S. W. 600; Quimbey v. Blackey, 63 N. H. 77; 25 Cyc. 1215.

A party who is guilty of fraud cannot avail himself of the statute of fraud for the purpose of protecting and retaining the fruits of his fraud. 5 Biner, Abr. pl. 40; Kinard v. Hiers, 3 Rich. Eq. (S. C.) 425, 55 Am. Dec. 643; Rogers v. Rogers, 87 Mo. 257; Haigh v. Kaye, L. R. 7 Ch. 469. So a fraud will estop a widow from claiming her dower. Dougrey v. Topping, 4 Paige (N. Y.) 94; Smiley v. Wright, 2 Ohio, 506; Ellis v. Diddy, 1 Ind. 561; Connolly v. Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278. See cases cited in a note in 25 L. R. A. 564.

Chapter 237, p. 348, Gen. Laws 1901, provided that after the expiration of a designated time the title to land registered under the Torrens system should be indefeasible. No exceptions were made; but in Baart v. Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394, it was held that when the registration was secured by fraud, and the rights of innocent purchasers were not involved, the decree would be vacated. These cases, and many others which might be cited, show conclusively that there are many things to be taken into consideration other than the literal language of the statute. The exact ground upon which the decisions proceed is not always clearly expressed; but by the application of some rule of construction, or some common-law or equitable principle, a party is prevented from securing what an exact and literal reading of a statute would give him.

While as a general proposition I find no difficulty in holding that this statute was not intended to be for the benefit of such a criminal, I nevertheless am of the opinion that under the conditions of this case the legal title of the land passed to the widow. But she obtained the

title by fraud and crime, and a court of equity, acting in personam, should deprive her of the fruits of her crime.

An effective argument in favor of this view was presented by Dean Ames in an article published in 36 Am. Law Reg. (N. S.) 229. In Tiffany's Modern Law of Real Property, vol. 2, § 505a, it is said that certain cases, "though no doubt correct in so far as they decide that the legal title to the property of the deceased passes to the murderer, are probably incorrect in that they fail to apply and recognize the principle that a court of equity will intervene to compel one who acquires property by the commission of a wrong to hold it as a trustee ex maleficio for the persons rightfully entitled to it."

A writer in the New York Law Journal says "that the requirements of these statutes can be satisfied, and yet a just result be reached, by the application of the familiar equitable principle that no one may take advantage of his own wrong, and that one who through crime or fraud acquires the legal title to property belonging to another must hold that title as a constructive trustee for the person thus wronged or his representatives. No one will claim that the result reached in the Nebraska and this Pennsylvania case was a just one, while the view here set forth accomplishes justice, violates no statute, and preserves the rights of a purchaser without notice of the crime or fraud. The application of this just principle makes unnecessary the attempted distinction between the cases of wills and the cases where the statutory law of descent are in question." This statement is quoted in 30 Am. Law Rep. 131, and the editor remarks that: "When a murderer comes red-handed into a so-called court of justice, and there demands that the court shall execute a statute in a manner which never could have been intended by the Legislature which enacted it, so as to put him into possession of property through a capital felony, * * * then the courts ought to withhold their aid. * * * By granting it they make themselves in a moral sense accessories after the fact, and lend encouragement to crimes of this kind."

Another legal journal in picturesque language says: "It really seems to us that the question is too clear for debate. The position of Nebraska, Ohio, and North Carolina courts, that a murderer may inherit from his victim, because the statute of descent does not say that he shall not, seems almost grotesque in its blind narrowness, amounting to practical immorality. One might as well contend that a highwayman, who kills a traveler and takes his horse, although he must go to prison, is still entitled to the horse, because the statute does not provide for the contrary. The Savior probably did not think that the wicked men in the parable were sound in law when they said: 'This is the heir; let us kill him, and the inheritance shall be ours.'" 6 Green Bag, p. 535.

As I understand the opinion prepared by the Chief Justice, it concedes that this equitable doctrine may properly be applied when the criminal is claiming under a will, but asserts that it is not applicable

when the party claims under the statute of descent. But I see no difference in principle. The objections are that the technical requirements of a trustee ex maleficio are not present. But the controlling principle lies much deeper, and the technical trusteeship is merely the means by which the principle is applied and the result worked out. Nor does the application of this rule violate the maxim that equity follows the law, which means merely that equity applies to equitable titles and interests those rules of law by which legal titles are regulated, provided this can be done in a manner not inconsistent with the equitable titles and interests themselves.

The doctrine that no man may profit by his own wrong lies deep down among the foundations of English jurisprudence. The maxim, "Nullus commodus capere potest de injuria sua propria," is a part of the common law. Broom, Legal Maxims, p. 297. "It is a maxim of law that no man shall take advantage of his own wrong." Coke Litt. 148b; 1 Hale, P. C. 482; 2 Hale, P. C. 386; 2 Inst. 713; Plowd. 309; Finden v. Parker, 11 Mees. & W. 680. "No system of jurisprudence," says Lord Justice Fry, "can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." To permit this would be to subject the law "to the reproof of committing the flagrant injustice of an atrocious criminal enriching himself by his own crime." Cleaver v. Mut. Life Ins. Co., 1 Q. B. 147.

There is no presumption that a statute was intended to repeal the common law. Endlich, Stat. Const. § 127; 25 L. R. A. 565, note. The principle that the operation of an act is to be interpreted in the light of the common law is, as we have seen, of constant application in all departments of the law, and parties are thus prevented from acquiring under the forms of the law new rights to which they are not in fact entitled.

Equity prevents fraud by taking from the wrongdoer the fruit of his deceit, and it accomplishes this by the beneficial doctrine of constructive trust. Whenever the title to property, real or personal, has been obtained by actual fraud, or through any other similar means, or under any other circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the benefits of interest, equity imposes a constructive trust in the property in favor of one who is truly and equitably entitled to the same. The form and variety of these trusts are practically without limit, as the principle is applied whenever necessary for the doing of complete justice. Such trusts are raised for the purpose of working out right and justice, and often directly contrary to the actual intention of the party who holds the legal title. Pomeroy, Eq. Jurisprudence (3d Ed.) vol. 1, § 155; Id., vol. 3, § 1053; Story, Eq. Juris. (13th Ed.) vol. 1, § 256; Rollins v. Mitchell, 52 Minn. 41, 53 N. W. 1020, 38 Am. St. Rep. 519.

This doctrine was applied in Nester v. Gross, 66 Minn. 371, 69 N. W. 39, where it was held that if one party obtains title to land by

fraud, or by the violation of a fiduciary relation, or in any other unconscientious manner, so that he may not equitably retain it, a constructive trust will be imposed upon it in favor of one who in good conscience is entitled to it. From what was said in Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540, it appears that this was really the ground upon which Riggs v. Palmer was decided. "The relief which may be obtained against her," says Chief Justice Andrews, "is equitable and injunctive. The court in a proper action will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It cannot and will not set aside the will. That is valid; but it will act upon facts arising subsequent to its execution, and deprive her of the use of the property."

The idea also appears in the Canadian case of McKinnon v. Lundy in the Ontario Court of Appeals, where Maclennes, J., said: "One can easily understand that, in the case of a murder committed with the very object of getting the property of the deceased by will or intestacy, the court could defeat that object, even by taking away from the criminal the legal title acquired by such means; and it may be that the court would go further, and take the legal title, even though the crime were committed without that object"—citing Luttrell v. Lord Waltham, cited in 14 Ves. 273, 290, and 2 W. & T. L. Cas. (6th Ed.) 611; Mestaer v. Gillespie, 11 Ves. 639; Story, Eq. Jur. §§ 256, 440. When McKinnon v. Lundy reached the Supreme Court of Canada, the original opinion was reinstated, thus reversing the Ontario Court of Appeals, and holding that the heir forfeited the devise by his crime. The Chief Justice said: "The principle upon which the devisee is held incapable of taking under the will of the person he kills is that no one can take advantage of his own wrong."

The doctrine has been applied under many varying conditions, but always for the purpose of preventing the wrongdoer from profiting by his wrong. The rule that, where the execution of a deed is induced by fraud or force, the legal title passes, but the grantee will be treated as a constructive trustee, is too familiar to require the citation of authorities. A devisee, who by fraud or force prevents the revocation of a will, will be considered a trustee for those who would be entitled to the estate if the will had been revoked. Gains v. Gains, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375; Brown v. Doane, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381, and cases cited in note. Fraud may be practiced in order to prevent, as well as secure, a conveyance, and at law the unexpressed intention of the grantor goes for nothing. But equity will see that the wrongdoer shall not profit by his wrong, and will require him to convey the legal title in such manner as to give effect to the defeated intention of the victim. * * *

The abolition of the formal distinctions between law and equity have not affected the power of a court of equity in such case. The Legislatures now, as formerly, enact statutes with full knowledge of the fact that the courts of equity still exercise their ordinary powers.

As said in Baart v. Martin, 99 Minn. 211, 108 N. W. 950, 116 Am. St. Rep. 394: "It must be presumed that the Legislature intended and expected that the courts of equity would remain open to parties who were able to bring themselves within the rules which require the granting of equitable relief. The fact that a statute does not expressly provide that fraud shall invalidate acts authorized to be done under it does not deprive the courts of the general power to protect the rights of parties." The fact that this statute does not expressly provide that a wife who murders her husband shall not inherit his estate does not by implication deprive the courts of equity of their ordinary powers to prevent the consummation of wrongs and fraud by acting directly upon and controlling the actions of individuals.

It is a remarkable fact that, while cases like the present were practically unknown in this country until within very recent years, they appear to have been quite common in older civilizations. The manner in which the questions were then disposed of is important only in so far as it confirms the statement of Lord Justice Fry that "no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person."

By the civil law those who, being capable of succeeding as heirs, rendered themselves unworthy thereof, were excluded from the succession. The causes which might thus render the heir unworthy were not limited to such as were expressly stated in the laws. They were, in fact, quite indefinite. "If there should happen," says Domat, "any other case where good morals and equity should require that an heir should be declared unworthy, it would be just to deprive him of the inheritance." Civil Law, Domat, part 2, bk. 1, t. 1, § 3; Mackelday, Roman Law, p. 550. In bringing about this result the civil law proceeded upon what were substantially the same principles which we have found applicable under our system of equity jurisprudence. It did not regard the will as revoked or the heir disinherited by the crime. The naked legal title to the property passed to the criminal, but was thereafter taken from him. It was a case of restitution, not of revocation. Winscheid, Pandekten, 111, § 669, and note 1; lex 7, § 4, D. de bonis damnatorum (48, 20); D. 34, 9, de his quæ ut dignis auferuntur; Maynz, Cours, v. 111, § 482; 8 Harv. Law Rep. p. 170. Under the Code Napoleon (section 727) a person who is condemned for having caused or having attempted to cause the death of the testator, or, being informed of his murder, does not divulge it to the officers of the law, is excluded from the succession. A similar provision is found in Quebec Code, §§ 610, 893. Demolembe, Suc. vol. 1, No. 217 et seq.

The invocation on Mrs. Tanke's behalf of the constitutional provision that no conviction shall work corruption of blood or forfeiture of estate rests upon a misapprehension of the scope and purpose of that provision. It found its way into the federal Constitution in connec-

tion with the punishment for treason. It was adopted in the constitutional convention with little discussion as a precautionary measure suggested by the history of the English law of treason. An early act of Congress (section 24, c. 36, Acts 1790) made the prohibition general by providing that "no conviction nor judgment for any capital crime shall work corruption of blood or forfeiture of estate." Similar provisions are found in the Constitutions of several states. Stimson, Federal & State Constitutions, p. 182, note 6. By the common law a person convicted of a felony was by operation of law placed in a state of attainder, which resulted in forfeiture of estate, corruption of blood, and civil death. This result followed, not from the commission of the crime, but as a result of the conviction thereof. The attainted person was not divested of his land until after office found. So, in the case of goods and chattels, forfeiture had relation only to the time of conviction, and after the commission of a felony and before conviction the guilty party could make a valid sale or assignment of his personal property. 1 Blk. Com. 132; 1 Chit. Crim. L. 733; Co. Litt. § 199; Nichols v. Nichols, Plowden, 477–486; Hawkins, P. C. bk. 3, c. 49, §§ 13, 30; Perkins v. Brady, 1 Hare, 219.

These provisions abolish the common-law rule by which corruption of blood and forfeiture of estate resulted from the conviction of a felony. Corruption of blood rendered the felon incapable of inheriting or of transmitting property by inheritance. Forfeiture of estate transferred his property to the state. The heirs were thus deprived of their inheritance and the treasury enriched, and it was to prevent the manifest wrong and injustice to innocent persons which resulted from this doctrine that these constitutional provisions were adopted. As said in Wallach v. Van Riswick, 92 U. S. 202, 23 L. Ed. 473: "No one ever doubted that it was a provision intended for the benefit of the children and the heirs alone—a declaration that the children should not bear the iniquities of the fathers." It cannot apply to a case, such as the present, where the heir is the wrongdoer and is claiming the inheritance as the result of her own wrong. If an attempt was being made to corrupt the blood of Mrs. Tanke, thus preventing her from transmitting her estate to her children and forfeiting it to the state, we would have a case within the constitutional prohibition.

The decree of the probate court assigned the land in question to Mrs. Wellner, and the prevailing opinion is to the effect that this decree is final and conclusive as to her right to the land. It is, of course, settled that the probate courts of this state are vested by the Constitution with exclusive jurisdiction over the estates of deceased persons, and their final decrees assigning the residue of an estate of a decedent, pursuant to Rev. Laws 1905, § 3790, conclude all parties in interest as to everything properly determined by the decree. Greenwood v. Murray, 26 Minn. 259, 2 N. W. 945; Appleby v. Watkins, 95 Minn. 455, 104 N. W. 301, and other cases therein cited. But such a decree is final and conclusive only as to matters within the jurisdiction of the

court, which were or might properly have been determined by the court in the course of the administration of the estate.

The probate court found that Wellner died seised of the lands in question, that the woman who is now known as Mrs. Tanke was the surviving spouse, and assigned the land in question to her. Upon all of these facts the decree, not having been appealed from, is now conclusive. But the title to the real estate did not vest in the widow by virtue of the decree of the probate court. It was required to determine who were the heirs of the deceased; that is, to ascertain and adjudge the fact of the identity of "the person or persons upon whom the law casts the estate in lands, tenements, and hereditaments immediately upon the death of the ancestor." 2 Blk. 201; 21 Cyc. 413. It decreed that a certain person was the surviving spouse and one of the heirs—that is, one of the persons referred to in the statute; and its determination of her heirship is conclusive. Fitzpatrick v. Simonson Mfg. Co., 86 Minn. 147, 90 N. W. 378. It can no longer be questioned that this woman was the widow of John Wellner.

But the legal title to the real estate had vested in the heirs before this decree was entered. It was neither created, strengthened, nor perfected by the decree. The common-law rule with reference to the descent of the real estate of a deceased person prevails in this state, subject to modifications designed to subject such real estate, when necessary, to the payment of debts, devises, and expenses of administration. In this respect we maintain the old distinction between real and personal property. * * *

It follows that upon the death of Wellner the title to his real estate passed to his heir; but Mrs. Wellner took the title subject to whatever defects existed therein, and subject to such limitations thereon as grew out of the fraudulent and criminal methods by which it was acquired. * * *

In my judgment the widow acquired the naked legal title to this real estate, subject to the power of a court of equity to deprive her of its beneficial use and require its conveyance as justice and equity demand. The administrator never took possession. The land was not required for purposes of administration. The effect of the decree, as said by Chief Justice Gilfillan, was "to discharge the land from the administration." The decree in no way affected the character of Mrs. Wellner's title to the land. She held it after as before the decree with all its deficiencies, and a court of equity might still deprive her of its beneficial use and require her to convey the title to her children.

I therefore respectfully dissent.

JAGGARD, J., concurs with ELLIOTT, J.[14]

[14] On homicide as affecting the devolution of property, see 36 Am. Law Reg. (N. S.) 225; 3 L. R. A. (N. S.) 726, note. Those courts that allow the murderer to take title do so, it would seem, in order that innocent purchasers for value from him may be protected. But that is no reason for refusing to make him or his grantee with knowledge a trustee ex maleficio.

SECTION 6.—PERSONS CIVILLY DEAD

AVERY v. EVERETT.

(Court of Appeals of New York, 1888. 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368.)

ANDREWS, J.[15] We concur in the conclusion of the courts below that by the true construction of the will of John H. Southwick his son, Charles H. Southwick, took upon the testator's death a vested remainder in fee, limited upon the life estate of his mother in the premises in question, subject, however, to be defeated by a condition subsequent, viz., his death without children, in which event the substituted remainder given on that contingency to Augustus Southwick, the son of the testator's brother, Nathan, would vest in possession, thereby displacing the prior fee given to the testator's son, Charles. Vanderzee v. Slingerland, 103 N. Y. 47, 8 N. E. 247, 57 Am. Rep. 701; In re Railroad Co., 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478. The plaintiff claims under the devise to Augustus Southwick.

The widow of the testator died September 1, 1869, after the death of her husband. Charles H. Southwick is still living, unmarried, and without children. If nothing further appeared, the plaintiff's action would necessarily fail, for the reason that the contingency had not happened upon which the estate of Augustus Southwick is limited, and the defendant, George Everett, who is the lessee of Charles H. Southwick, would be entitled to judgment. The plaintiff, to obviate this apparent difficulty, proved that Charles H. Southwick, in October, 1875, was convicted of the crime of murder in the second degree, and was thereupon sentenced to imprisonment in the state prison at Auburn for the term of his natural life, and from that time has been imprisoned pursuant to such sentence. The plaintiff contends that as the life-estate of the widow was terminated by her death, and as Charles H., on his sentence to imprisonment for life, became civilly dead, the contingent estate given by the will to Augustus Southwick in case "Charles H. should die without children," has become an actual fee. * * *

The Revised Statutes declare that a person sentenced to imprisonment for life "shall thereafter be deemed civilly dead." 2 Rev. St. p. 701, § 20. * * *

To ascertain the meaning of the phrase "civil death," as used in the Revised Statutes, and whether the statute on a sentence of an offender to imprisonment for life operates eo instanti to divest him of his es-

[15] The statement of facts, part of the majority opinion, and all of the dissenting opinion of Earl, J., are omitted.

tate, it is important to consider how civil death affected rights of property at common law. By the ancient common law, when sentence was pronounced for a capital offense, the offender, by operation of law, was placed in a state of attainder. 1 Chit. Crim. Law, 723. There were three principal incidents consequent upon an attainder for treason or felony—forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death. Forfeiture was a part of the punishment of the crime, and was of Saxon origin, by which the goods and chattels, lands and tenements of the attainted felon were forfeited to the king; the former absolutely on conviction, and the latter perpetually, or during the life of the offender, on sentence being pronounced. The doctrine of corruption of blood was of feudal origin, introduced after the Norman conquest. The blood of the attainted person was deemed to be corrupt, so that neither could he transmit his estate to his heirs, nor could they take by descent from the ancestor. The crime of the attainted felon was deemed a breach of the implied condition in the donation of the feud, dum bene segesserit, and the descent to his heirs being interrupted by the corruption of blood, his lands escheated to the lord. But this escheat was subordinate to the prior and superior law of forfeiture. Com. Dig. tit. "Forfeiture" K; 2 Bl. Comm. 252; 1 Chit. Crim. Law, 723–728; 1 Broom. & H. Comm. 404; Rex v. Morphes, 1 Salk. 85.

The incident of civil death attended every attainder of treason or felony, whereby, in the language of Lord Coke, the attainted person "is disabled to bring any action, for he is extra legem positus, and is accounted in law civiliter mortuus" (Co. Litt. § 199, note), or, as stated by Chitty (1 Crim. Law, 724), "he is disqualified from being a witness, can bring no action, nor perform any legal function; he is in short regarded as dead in law." The forfeiture of the estate of the attainted felon to the king or to the lord, was not, it would seem, a consequence of the situation in which he was placed, of civiliter mortuus, but proceeded upon distinct and independent reasons, and this, we think, is rendered plain when we consider how the law of forfeiture was construed. The attainted person was not divested of his lands till office found. This is very distinctly held in Nichols v. Nichols, 2 Plow. 486, where the question was put: "If the possession in deed or law of the lands of a person attainted of treason should not be in the king before office found, in whom should it be, by the course of the common law, in the life of the person attainted?" and it was held that the freehold of such lands would be in fact in the person attainted so long as he should live; "for," the court say, "as he hath capacity to take in deed lands by a new purchase, so hath he power to retain his ancient possessions, and he shall be tenant to every præcipe." See, also, Vin. Abr. tit. "Forfeiture," 9. So, also, the latter opinion is that he could devise his lands, subject only to the right of entry for the forfeiture. In Bac. Abr. tit. "Wills and Testa-

ment," B, it is said that, "however the wills of traitors, aliens, felons, and outlawed persons are void as to the king or lord that has the right to the lands or goods by forfeiture, yet the will is good against the testator himself, and all others but such person only." See, also, Vin. Abr. tit. "Attainder"; 1 Jarm. Wills (5th Ed., Bigelow) *42.

An attainted person could also demise his lands before office found. This was expressly held in Doe v. Pritchard, 5 Barn. & Adol. 765, citing a passage from Perkins, "that a man attainted of felony or murder may make a grant of a rent, or common, or a feoffment, and the same shall bind all persons but the king and the lord of whom the land is holden." So a person attainted could take lands by devise or purchase. He could be grantor or grantee after attainder, and the grant would be good as against all persons except the king. Vin. Abr. tit. "Attainder"; Shep. Touch. 231; Perk. Prof. Bk. 26, 48. He could not sue, but could be sued (Vin. Abr. supra), and his body could be taken in execution, subject, however, to the paramount claims of public justice (1 Chit. Crim. Law, 725; Davis v. Duffie, 1 Abb. Dec. 489). He could make no contract which he could enforce. In Kynnaird v. Leslie, L. R. 1 C. P. 389, it was said by Willes, J.: "Moreover, an attainted person is not incapable of contracting, though he cannot pray in aid of the king's courts to enforce his contracts. He can contract with those whose consciences bind them to fulfill their engagements, and he can take a grant, or grant to others even the inheritance which an office found would escheat to the crown; and the rights so acquired by third parties may be the subject of an action in her majesty's courts, and his contracts may be enforced against him." In the case last cited it was held that when one attainted of treason escaped to a foreign country, and there married, and had children, and was afterwards executed on the same attainder, the marriage was valid, and the children legitimate, and that they could inherit from each other, since they were not compelled to trace the inheritance through the ancestor.

It seems to be a necessary conclusion from the rules of the common law governing rights of property as affected by forfeiture for crime, that civil death, one of the consequences of conviction for treason or felony, did not of itself, as a general rule at least, operate to divest the offender of his title to his lands. This would be inconsistent with the settled doctrine that an attainted person retained his title and possession till office found, and that meanwhile he could make a grant or demise, good except as against the king. If civil death worked of itself a divestiture of his estate, either no entry would be necessary to complete the title of the crown by forfeiture, or the alternative result would follow—that the title would be in abeyance from the time of the attainder until entry by the king or lord—for the heir could not take by reason of corruption of blood, and the felon's title would be gone by his civil death. But we have not been able to find any case showing that as a general rule civil death modified in any respect the

law of forfeiture, or deprived the attainted person of his lands before the forfeiture was enforced by entry.

The appellant, to sustain his contention that by the common law civil death consequent upon attainder operated eo instanti to divest the title of the offender to his lands, relies upon the text of Littleton (section 200) and the Commentaries of Lord Coke. Littleton, in the section cited, speaking of the classes of persons who cannot maintain an action, mentions, as the fifth class, persons who have entered into religion, and become monks professed. Such a person, he says, "is dead in the law, and his sonne or next cousin incontinent shall inherit him as well as though he were dead. indeed. And when he entereth into religion, he may make his testament, and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed; and if he make no executors when he entereth into religion, then the ordinary may commit the administration of his goods to others as if he were dead indeed." The doctrine that persons entering into religion and becoming monks professed were civilly dead proceeded on the ground that, as they thereby renounced all secular concerns, and held themselves freed from the obligations resting upon other members of civil society, they should be treated as though they were dead in fact, and as having surrendered all their civil rights. 1 Bl. Comm. 132. Coke, in commenting on the passage from Littleton above quoted, says: "And here it is to be observed that an abjuration, that is a deportation for ever into a forreine land like to profession (whereof our author speaketh here), is a civil death, and that is the reason that the wife may bring an action, etc., and so it is if by an act of parliament the husband be attainted of treason or felony, and, saving his life, is banished, this is a civil death, and the wife may sue as a femme sole."

It will be observed that Coke adds two instances of civil death to the one mentioned by Littleton, namely, abjuration and banishment on attainder by act of parliament. But in his note to section 199, already quoted, he declares that every person attainted of high treason, petit treason, or felony, is accounted in law "civiliter mortuus." The fair conclusion from a comparison of these passages is that the strict civil death mentioned by Littleton in the case of a monk professed, which was followed by an extinction of civil rights, including the right of property, was confined to monks and the two other cases mentioned by Coke. This seems to have been the interpretation of Blackstone, who, in the enumeration of the causes of civil death, in which the next heir inherits the estate as though the ancestor was absolutely dead, mentions the three cases of profession, abjuration and banishment, and no others. 1 Bl. Comm. 132. In case of profession, the civil death was not a consequence of crime. Abjuration, which was connected with the law of sanctuary, was a method by which a criminal escaped punishment on condition of taking an oath of abjuration, and leaving the realm forever. Banishment on attainder by act of parlia-

ment was a power only exerted in rare instances. Both sanctuary and abjuration were abolished by Statutes James I, c. 25, and 20 James I, c. 18.

The Statute 54 Geo. III, c. 45, abolished forfeiture of lands and corruption of blood in every case except treason, petit treason, and murder, "so that," as said by Chitty, writing soon after the passage of that statute, "at the present day, on attainder of ordinary felony, the criminal forfeits only his goods and chattels, and the profits of land during life, while his real estate comes in the ordinary channels to his heir, who is thus restored to the full capacity to inherit." 1 Chit. Crim. Law, 735. Still later the Statute 33 & 34 Vict. c. 23, swept away the whole doctrine of attainder, corruption of blood, and forfeiture, except forfeiture consequent on outlawry; and the same statute provided for the administration of the estate of the convicted felon by trustees for the benefit of his children and the support of his family. Under this statute the real property of a traitor or felon remains his own, subject to the temporary estate of the trustees, and he may dispose of it by his will; but by the statute he is incapable of alienating or charging his property, or of making any contract. 1 Jarm. Wills (5th Ed., Bigelow) 44.

It is a suggestive fact bearing upon the point we are considering that no case is to be found, either before or after the Statute 54 Geo. III, in which it has been held that a conviction of felony cast the descent of the felon's land upon his heirs, as though he was dead in fact. And since the Statute 33 & 34 Vict. it is certain that such a doctrine has been unknown to the law of England. That statute assumed that the title of the felon to his lands was not divested by his conviction.

It remains to consider how the question stands in the light of our own statutes and decisions. The cases on the subject are few, but there are two which deserve especial attention—Troup v. Wood, supra [4 Johns. Ch. 248], and Platner v. Sherwood, 6 Johns. Ch. 118, decided in 1820 and 1822. * * * The case of Platner v. Sherwood was a direct adjudication that by the general rule of the common law civil death did not operate as a divestiture of the estate of the convicted felon. * * *

On looking at the statutes regulating the transfer and devolution of property upon the death of the owner, it will be found that their natural import confines the meaning to a natural and actual death. * * * The only statute we have found which permits an inference that civil death consequent upon imprisonment for life operates to divest the convict of his estate is a provision in the act relating to "absconding, concealed, and nonresident debtors," which permits the proceedings authorized thereby to be taken "whenever any debtor shall be imprisoned in the state prison for a term less than his natural life" (2 Rev. St. p. 15, § 1); making no provision, and giving no remedy,

under that act against the property of one imprisoned on a life sentence. * * *

But when it is considered that no case in this state can be found where the will of a person imprisoned on a life sentence has been admitted to probate during his natural life, or where administration has been granted on his estate, or dower assigned as if he was dead; nor any case where the title to property has been traced through a civil, as distinct from a natural, death,—the inference seems almost irresistible that the doctrine that civil death consequent upon a life sentence divests the criminal of his estate has no foundation in our law. As to right of administration, see Frazer v. Fulcher, 17 Ohio, 260. The disabilities flowing from the situation of civiliter mortuus have a wide scope, without including this incident. The statute, without expressly declaring this result, assumes that a life sentence of the husband ipso facto dissolves his marriage. 2 Rev. St. p. 687, § 9, subd. 6. The convict cannot sue, although he may be sued; and his property is answerable to his creditors. But he may defend an action brought against him. Code, § 131; Davis v. Duffie, supra; Bowles v. Habermann, 95 N. Y. 246. He cannot enter into executory contracts and call in aid the courts to enforce them. But he may transfer his property by will or deed. See Rankin's Heirs v. Rankin's Ex'rs, 6 T. B. Mon. (Ky.) 531, 17 Am. Dec. 161, and authorities, supra. His political rights are taken from him; his wife and children owe him no fealty or obedience. It is not difficult to suggest possible difficulties which may arise in the administration and protection of the property of a convict sentenced to imprisonment for life. These are matters which may be the appropriate subject of legislation. They have been met in England by the Statute 33 & 34 Vict., by which a trustee is appointed to administer the convict's estate for the protection of all interests.

We here conclude our examination of the interesting question presented by this record. Any one who takes the pains to explore the ancient and in many respects obsolete learning connected with the doctrine of civil death in consequence of crime, will find that he has to grope his way along paths marked by uncertain, flickering, and sometimes misleading lights; and he cannot feel sure that at some point in his course he has not missed the true road. But there is a guiding principle, which in the present case greatly aids in solving the question presented, and that is that no one can or ought to be divested of his property in invitum, except by the clear warrant of law; and this we think is not found in the statute relating to civil death. The weighty words of Chancellor Kent, in Platner v. Sherwood, may appropriately conclude this opinion: "The penal consequences of attainder must be necessary deductions severely required by the premises; and, as there was to be no forfeiture of the estate, the law would not be consistent with itself if it held the party alive for the

purpose of being sued and charged in execution, and yet dead for the purpose of transmitting his estate to his heirs."

We think the order of General Term should be affirmed, and judgment absolute entered for the defendant on the stipulation. All concur, except EARL, J., dissenting, and GRAY, J., not sitting.[16]

In re DONNELLY'S ESTATE.

(Supreme Court of California, 1899. 125 Cal. 417, 58 Pac. 61, 73 Am. St. Rep. 62.)

HARRISON, J. Thomas Donnelly died intestate February 17, 1896, and on December 3, 1897, the superior court made a decree distributing his estate to his widow and the successors in interest of three of his children. The decedent left surviving him another child, James J. Donnelly, who, prior to his father's death, viz. October 5, 1894, was sentenced to imprisonment in the state prison of the state of California for the term of his natural life, and who at the time of his father's death and at the date of the said decree of distribution was in confinement therein under such sentence. February 11, 1897, James made an assignment and transfer of his interest in the estate of his father to Charles J. Stilwell, who, by virtue thereof, claimed to have a portion of the estate of the decedent distributed to him. The court denied his claim, and distributed the estate as above stated. From this decree of distribution Stilwell has appealed.

Section 674 of the Penal Code is as follows: "A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead." Civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law. In Anderson's Law Dictionary civil death is defined to be "extinction of civil rights." Bouvier says: "Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them is considered as dead." Abbott defines civil death to be "the legal privation or extinction of a person's rights and capacities among his fellow members of society." In Nerac's Estate, 35 Cal. 392, 95 Am. Dec. 111, the court said: "If the convict be sentenced for life, he becomes civiliter mortuus, or dead in law, in respect to his estate, as if he was dead in fact."

[16] In Smith v. Becker, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141 (1901), it was held that, under the Kansas statutes, civil death did not cast the descent of the convict's property upon his heirs. See, also, Wooldridge v. Lucas, 7 B. Mon. (Ky.) 49 (1846). The Kansas court said, however (62 Kan. 544, 64 Pac. 71 [53 L. R. A. 141]): "We have no doubt of the power of the Legislature, by express language, to cast the descent of a convict's property, in the event of his civil death, on such persons as would be heirs at law in case of natural death." But see Frazer v. Fulcher, 17 Ohio, 260 (1848). Compare the cases in the notes to In re Zeph's Estate, post, p. 494.

If James had died a natural death at the time he was sentenced to imprisonment in the state prison for the term of his natural life, the correctness of the decree would be unquestioned, and for the purpose of any right of inheritance his civil death must have the same effect. The right of inheritance is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. The provisions of sections 675 and 676 of the Penal Code, instead of impairing this construction given to section 674, strengthen it by showing that, but for these provisions, in the opinion of the legislature, the civil death of the felon would extend to the cases therein named; and the enumeration of the cases wherein section 674 is inoperative authorizes the conclusion that those are the only cases in which it is not to be applied.

Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368, cited by the appellant, has no application to the facts of the present case. In that case the testator died in 1869, leaving to his son, Charles, an estate in the lands in question, which the court held to be a vested remainder in fee, limited upon the life of his mother, but subject to be defeated by his dying without children. This remainder was property capable of being transferred by Charles, and vested in him at the death of his father. In 1875 Charles was convicted of murder, and sentenced to imprisonment in the state prison for the term of his natural life. The court was not called upon to consider whether his right of inheritance was destroyed by the sentence, but whether the sentence operated to devest him of the property at that time owned by him, and held that the sentence did not have the effect to devest him of his interest in the land.

The same rule exists in this state by virtue of section 677 of the Penal Code, which provides: "No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law." Under the conclusion reached herein it is unnecessary to consider the respondent's motion to dismiss the appeal. The decree is affirmed.[17]

[17] In Estate of Wm. Stott, Myr. Prob. (Cal.) 168 (1878), the wife of a man civilly dead was held to be entitled to take as a "widow" a considerably increased gift, which under her father's will was to go to her in case she should become a widow.

SECTION 7.—ALIENS

"At the common law an alien has no inheritable blood, and can neither take land himself by descent, nor transmit land from himself to others by descent; and alienage in any mediate ancestor will interrupt the descent between persons, who are capable of taking and transmitting land by descent." Gregory, J., in Murray v. Kelly, 27 Ind. 42, 46 (1866).

"The common-law rule is, and always has been, that a citizen cannot take by representation from an alien, because the alien has no inheritable blood through which the title can be deduced. 2 Kent, Com. 54." Bailey, J., in Beavan v. Went, 155 Ill. 592, 600, 41 N. E. 91, 31 L. R. A. 85 (1895).

"But it is a well-settled principle of the common law that the descent between brothers, or between a brother and sister, is immediate, and the alienage of the father does not impede the descent between children. * * * The brothers and sisters are respectively stocks of descent, and alienism is an impediment only where it comes between the stock of descent and the person claiming to take. And if some of the persons who answer the description of heirs are incapable of taking by reason of alienage, they are discouraged, and the whole title vests in those heirs competent to take, provided they are not compelled to trace the inheritance through an alien." Andrew, J., in Luhrs v. Eimer, 80 N. Y. 171, 179 (1880).[18]

[18] On inheritance by an alien, see 31 L. R. A. 177, note. The matter is governed to-day by treaties and by local statutes.

On the effect of treaties on an alien's right to inherit, see 32 L. R. A. 177, note. On the effect of state Constitutions and statutes, see 31 L. R. A. 84, note; Id. 146, note. See, also, Haley v. Sheridan, 190 N. Y. 331, 83 N. E. 296 (1907); Abrams v. State, 45 Wash. 327, 88 Pac. 327, 9 L. R. A. (N. S.) 186 (1907).

CHAPTER III

THE LIABILITY OF HEIRS FOR THE ANCESTOR'S DEBTS[1]

MACKIN v. HAVEN et al.

(Supreme Court of Illinois, 1900. 187 Ill. 480, 58 N. E. 448.)

MAGRUDER, J.[2] 1. The propositions of law numbered 4 and 5 asked by the appellant upon the trial below, and refused by the trial court, announce that the appellees (plaintiffs below) having failed to file the claim sued on in this case against the estate of Thomas Mackin, deceased, within two years from the granting of letters of administration on said estate, the claim was forever barred, by section 70 of chapter 3 of the Revised Statutes of Illinois, unless the appellees should find other estate of Thomas Mackin, not inventoried or accounted for by the administrators of said estate. The refusal of propositions numbered 4 and 5 raises the question whether this suit is properly brought as to the time when it was brought, and as to the person against whom it is brought.

Section 11 of chapter 59 of the Revised Statutes, entitled "Frauds and Perjuries," provides that any person, his heirs, etc., who may have any debts or demands against any person who shall die intestate, and leave real estate to his heirs, to descend according to the laws of this state, may have and maintain the same actions which lie against executors and administrators upon his bonds, specialties, contracts, and agreements, against the executors or administrators and the heirs, or against the executors or administrators and the devisees, or may join the executors or administrators, the heir or heirs, and the devisees of such obligor, and shall not be delayed for the nonage of any of the parties. 2 Starr & C. Ann. St. (2d Ed.) p. 2029. Section 12 of the same act provides that when any lands shall descend to any heir, and the personal estate of the ancestor of such heir shall be insuffi-

[1] "I have shown elsewhere that originally the only person liable to be sued for the debts of the deceased, if they were disputed and had not passed to judgment in the debtor's lifetime, was the heir. In Glanville's time, if the effects of the ancestor were not sufficient for the payment of his debts, the heir was bound to make up the deficiency out of his own property. In the case of debts to the king, this liability continued as late as Edward III; royalty, like religion, being a conservator of archaisms. The unlimited liability was not peculiar to England. While it continued, we may conjecture with some confidence that a judgment against the heir was not confined to the property which came to him from his ancestor, and that such property belonged to him outright." Mr. Justice O. W. Holmes on "Executors," in 9 Harv. Law Rev. 42.

[2] The statement of facts and a part of the opinion are omitted.

cient to discharge the just demands against such ancestor, such heir shall be liable to the creditor of the ancestor to the full amount of the lands, or rents and profits out of the same, as may descend or be devised to the said heir, etc. Id. p. 2030. Section 13 of said act provides that, when any suit is brought against any heir, he may plead riens per descent at the time of the commencement of the suit, and the plaintiff may reply that he had lands from his ancestor before the commencement of the suit, and if, upon issue joined, it be found for the plaintiff, the jury shall inquire of the value of the lands, etc., and thereupon judgment shall be given and execution awarded as aforesaid, etc. Id. p. 2031.

Section 70 of chapter 3 of the Revised Statutes, entitled "Administration," provides that "all demands not exhibited within two years, as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased, not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid pro rata out of such subsequently discovered estate," etc. 1 Starr & C. Ann. St. (2d Ed.) p. 302. Section 67 of the same act provides that "any creditor, whose debt or claim against the estate is not due, may, nevertheless, present the same for allowance and settlement, and shall, thereupon, be considered as a creditor under this act, and shall receive a dividend of the said decedent's estate, after deducting a rebate of interest for what he shall receive on such debt, to be computed from the time of the allowance thereof to the time such debt would have become due, according to the tenor and effect of the contract." Id. p. 300.

It is conceded that the claim of appellees for rent, which is sued upon in this case, was not presented against the estate of Thomas Mackin within two years after the issuance of letters of administration. The contention of appellant is that it could have been presented within the time stated, and, inasmuch as it was not so presented, that it has been barred, and cannot now be enforced. It is also claimed by counsel for appellant that this suit could not be brought against the heirs of Thomas Mackin, under the above-quoted sections of chapter 59, because he left personal property sufficient to discharge all demands against his estate.

The contentions of appellant would have much force if the remedy here sought to be enforced was under the statutes above named. But the lease or party wall agreement of August 1, 1872, contained a provision that all the conditions and covenants therein contained "shall be binding upon the heirs, executors, administrators, and assigns of the parties to these presents, respectively." At common law the heir, as such, was not liable for the debts of the estate of his ancestor, but took the real estate free of any claims of general creditors. While this was so, yet at common law "the ancestor might, by a specialty, bind the heir to the payment of a debt, by expressly so declaring in the deed, and the heir was then bound to the extent of assets descend-

ed; that is, to the extent of the value of the real estate coming from the ancestor to the heir by inheritance, for the word 'assets,' in this connection, always meant real estate." People v. Brooks, 123 Ill. 246, 14 N. E. 39; Tayl. Landl. & Ten. § 462; Ryan v. Jones, 15 Ill. 1; Hoffman v. Wilding, 85 Ill. 453. In Ryan v. Jones, supra, this court said: "Nor was an heir liable for the debts of the ancestor, in respect of lands descended, except in particular cases, such as debts due on specialties, in which the ancestor expressly bound the heir."

The debt sued for in the case at bar is a debt due upon a specialty, to wit, a lease or party wall agreement under seal, and by the express terms of that specialty the heirs of Thomas Mackin are bound. The appellant, as heir of Thomas Mackin, received by descent real estate worth more than $100,000. It would appear, therefore, to be clear that the heirs of Thomas Mackin are liable for the rent sued for under this lease. The liability thus imposed at common law could only be escaped by pleading and proving riens per descent. As was said in People v. Brooks, supra: "If the heir had bona fide aliened the lands which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent at the time of suing out the writ or filing the bill, and the obligee had no remedy at law." See, also, Crocker v. Smith, 10 Ill. App. 376.[3]

[3] "Under the civil law, the acceptance of the succession by the heirs rendered them liable for the ancestor's debts, and in Louisiana the heir has the right to so qualify his acceptance that he may avoid personal liability by abandoning the effects so received to the ancestor's creditors. Montgomery v. Culton, 18 Tex. 749; Succession of Murray, 41 La. Ann. 1112 [7 South. 126]. It is evident that under such a system it was hazardous for the heir to accept, since the ancestor's debts might absorb, not only the property so received, but also the individual estate of the heir. Under the common law the heir took the lands discharged of all debts of the ancestor, except specialties in which he had been specially bound; his liability in such case being on the contract, by which the ancestor was authorized to bind himself personally to the extent of the value of the lands descended, so long as they remained in his possession, but there was no lien on the lands, nor personal liability on his part after he had conveyed them (Investment Co. v. Smart, L. R. 10 Ch. App. Cases, 577), and the devisee took the lands free from all debts of the ancestor (Sauer v. Griffin, 67 Mo. 654; 3 Williams on Executors, c. 11), while the executor or administrator took the property to which he was entitled under the law subject to the payment of the decedent's debts. Thus under the civil law great injustice might be done the heir by absorbing both the ancestor's and his own property in the payment of the ancestor's debts, and under the common law a like injustice might result to the creditor by allowing the heir to take valuable lands free of debts where he had not been bound by any specialty, or, even if he had, to evade his liability thereon by a sale of the lands before suit, or by allowing the ancestor to practically defeat even specialty creditors by devising his lands. In order to remedy some of these evils, statutes were enacted in England at an early day imposing upon the devisee a like liability to that resting upon the heirs and making both liable, not only while they retained the property, but for the value in case they sold the same. See statute set out in Williams on Executors, vol. 3, c. 2. But under the common law, thus amended by statute, the ancestor's debts, even by specialty, were not charged as a lien on the lands, and the heir or devisee could prevent the creditor from subjecting them by transferring to a bona fide purchaser before suit. Spackman v. Timbrell, 11 Eng. Ch. Rep. 424. From this general statement of the

It is claimed on the part of the appellant that the common-law remedy upon specialties, in which the ancestor expressly bound the heir, has been superseded by sections from 11 to 14, inclusive, of our statute in regard to frauds and perjuries, being chapter 59 of the Revised Statutes. We are of the opinion, however, that the provisions of the statute thus referred to are merely cumulative to the common-law remedy. They have the effect of furnishing additional remedies to all the creditors of the deceased, including specialty creditors. * * *

In Crocker v. Smith, supra, the appellate court, speaking through the late Justice Baker of this court, who was then a member of that court, said: "It is clear that appellee does not, by the averments in his declaration, bring himself within the provisions of the statute of frauds and perjuries; and it is contended by appellant that the provisions of that statute worked a repeal of the common-law remedy. We do not so understand the law. The remedies against heirs and devisees furnished by the statute are cumulative in their character, and afford not only a means for the collection of many debts and demands against deceased persons, for the collection of which no provision existed prior thereto, but also additional means for the collection of such debts as were already, at common law, a charge upon the heir. The purpose of the statute was not to change the common-law remedy then existing for specialty creditors, when the ancestor had expressly bound the heir, but to give additional remedies, not only to them, but to all creditors of the deceased."

The view that the statute has not superseded the old common-law rule and remedy, but has merely given additional and cumulative remedies, is sustained by the principles of statutory construction applicable in such cases. It is a general rule in the construction of statutes that they are not to be presumed to alter the common law further than they expressly declare. Statutes are to be construed in reference to the principles of the common law, and it is not to be presumed that the legislature intends to make any innovation upon the common law, further than the case absolutely requires. Cadwallader v. Harris, 76 Ill. 370; Bank v. McCrea, 106 Ill. 281; Smith v. Laatsch, 114 Ill. 271, 2 N. E. 59. * * *

Counsel for appellant refers to a number of cases in support of the position that the heir is not liable for the debts of his ancestor where such ancestor leaves personal estate sufficient to discharge all just demands against his estate. People v. Brooks, supra; Guy v. Gericks, 85 Ill. 428; Hoffman v. Wilding, supra; Laughlin v. Heer, 89 Ill. 119; McLean v. McBean, 74 Ill. 134. But a careful study of

condition of the civil and common law, modified by English statutes, it may be seen that it was advisable, when our Legislature came to enact our probate law in 1848, to make radical departures from both in order to do equal justice to creditors on the one side, and heirs, devisees and legatees on the other.' Denman, J., in Blinn v. McDonald, 92 Tex. 604, 606, 607, 46 S. W. 787, 788 (1899).

these cases will show that, under the facts therein stated, there were no common-law remedies. In all the cases so cited the proceedings were attempted to be had directly under the statute, and they were all cases in which no remedy existed at the common law; and, to justify a recovery, it was necessary that the statute should be strictly complied with. There is nothing in these cases, so far as we can discover, which is inconsistent with the decision in Crocker v. Smith, supra.

Inasmuch as the remedy here sought to be enforced is the common-law remedy above referred to, it was not necessary to file the present claim against the estate of Thomas Mackin, or to make any attempt to collect it from his personal estate. In addition to this, the rent did not fall due until August 1, 1896, which was after the expiration of the two years allowed by law for the filing of claims in the county or probate court. In construing section 67 of chapter 3 in regard to "Administration," as to the matters above quoted, we held in Dunnigan v. Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496, that, if the obligation is an absolute undertaking, the claim can properly be proved against the estate in the probate court, even where the debt or claim is not due, but that, if the obligation is merely a contingent liability, then the claim is not properly provable in the probate court, and cannot be allowed. In Stone v. Clark's Adm'rs, 40 Ill. 411, where the claim filed was based upon an indemnifying bond made by Clark, under which no damage resulted to Stone until more than two years after letters of administration were granted, it was held that Stone had no claim until he was damnified, and as he was not liable on the notes, and suffered no damage until after the lapse of the two years, his claim had not accrued within two years, and no suit could have been instituted within the two years.

In the case at bar the lease or party wall agreement provides that the premises are to be held by Thomas Mackin from August 1, 1872, until August 1, 1902, "if the said wall, one-half of which is upon the premises hereby demised, shall stand so long. This lease to be immediately determined by a total destruction of said wall." It thus appears that until August 1, 1896, arrived, it could not be determined whether the wall might not be totally destroyed, or whether the lease might not be determined by failure to pay the rent, or what amount of rent would be due on that day; for at any time the representatives of the Haven estate might see fit to use some portion of the wall erected by Mackin under the terms of the lease, and in such case deduction would be required from the amount of the rent. The payment of rent under this lease was, therefore, dependent and conditioned upon the happening or not happening of certain events. If the claim had been presented to the probate court during the two years for the rent due August 1, 1896, it would have been a sufficient answer thereto to say that the rent was only payable upon a contingency. The only effect of the provision of the statute embodied in section 70

of chapter 3, as above quoted, is to bar any action against the administrator or executor unless the claim is filed within the two years, except as to assets not inventoried. Snydacker v. Cattle Co., 154 Ill. 220, 40 N. E. 466.

Counsel for appellant objects to the form of the judgment entered by the court below, and says that the judgment was erroneous, because it was rendered against the appellant alone, whereas it is claimed that the judgment, if any, should have been against appellant and the other heir, payable out of the real estate descended. This question was not raised either in the county or appellate court, and it is therefore too late to consider it in this court. It is shown here that appellant, as heir of Thomas Mackin, received real estate by descent, exceeding in value $100,000, and that he still holds all the property so acquired, and at the time of the trial was in receipt of the rents and profits thereof. He was clearly personally liable for the payment of this claim, arising out of a breach of his ancestor's covenant. That covenant bound him jointly with the other heirs of Thomas Mackin, and by the statute of this state "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." Rev. St. c. 76, tit. "Joint Rights and Obligations," § 3; 2 Starr & C. Ann. St. (2d Ed.) p. 2321. * * *

The judgment of the Appellate Court [affirming a judgment of the county court in favor of plaintiffs] is affirmed. Judgment affirmed.[4]

[4] Local statutes should be consulted. "By virtue of statutes now in force it is the universal rule in the United States that the real estate of a decedent is assets for the payment of his just debts of every description, but the methods of appropriating it by action at law against heirs or devisees are far from uniform. In some of the states the creditor may sue the heirs or devisees jointly with the personal representatives, or separately under certain specified conditions. In others the legal liability of heirs and devisees is provisional only and depends upon the exhaustion of remedies by action or otherwise against the personal representatives. In still others it seems that the heirs are not liable to actions at law by creditors, and the remedy of the latter against the realty appears to be confined to the statutory proceeding for a sale in the court having jurisdiction of administrations." 10 Encyc. Pl. & Pr. 26–30. On liability under the Missouri statute, see State v. Burnes, 129 Mo. App. 474, 107 S. W. 1094 (1908). It seems that in Arkansas a bona fide purchaser from the heirs prior to suit by the creditor takes free from the creditor's claim, but the heir is liable for the proceeds of sale. See Cole v. Hall, 85 Ark. 144, 107 S. W. 175 (1908). On the liability of heirs for the ancestor's debts, see 112 Am. St. Rep. 1017, note; 48 Am. Dec. 395, note; 21 L. R. A. 89, note; 10 Prob. Rep. Ann. 362, note. That the heir is not liable for covenants on which the ancestor (a married woman) could not be held is decided in Foster v. Wilcox, 10 R. I. 443, 14 Am. Rep. 698 (1873).

LOWRY v. JACKSON et al.

(Supreme Court of South Carolina, 1887. 27 S. C. 318, 3 S. E. 473.)

McIver, J.[5] Inasmuch as the questions presented by this appeal arise under a demurrer, a brief statement of the pleadings becomes necessary. The allegations of the complaint are substantially as follows: (1) That said Alexander May made his note under seal to Alfred M. Lowry, dated twenty-ninth of December, 1859, and payable one day after date, for the sum of $48.91; (2) that Alexander May died intestate some time in the year 1860, seised and possessed of certain real estate, and that letters of administration upon his estate were duly committed to the defendant Jackson; * * * (5) that said Alexander May left surviving him, as his heirs at law, his widow, Susannah, and his two children, Peter and the defendant Mary, who has since intermarried with the defendant David T. Redfearn; (6) that some time in the year 1861, the said Peter May died intestate, leaving, as his sole heirs at law, his mother, Susannah, and his sister, the defendant Mary, and that the said Susannah died intestate in 1875, leaving as her sole heir at law the defendant Mary, and administration of her personal estate has been duly committed to the defendant, Mulloy; (7) that the land of which the said Alexander May died seised consisted of two tracts—one in the state of North Carolina, and the other in South Carolina, Chesterfield county, of which a particular description is given, and that the South Carolina tract largely exceeds in value the amount now due on the said note, and that there never has been any partition of the same; (8) that, after the death of said Alexander May, his abovenamed heirs at law held and occupied the said land as tenants in common until the death of Peter, when the same was held in common by the said Susannah and the defendant Mary, with her husband, until the death of said Susannah, since which time it has been in the possession of the defendants Mary H. Redfearn and David T. Redfearn; (9) that Alfred M. Lowry died intestate in 1877, and administration of his personal estate has been duly committed to the plaintiff; (10) that no part of the said note has been paid. * * * Wherefore the plaintiff demanded judgment against the said Mary H. Redfearn, and her husband, David T. Redfearn, (1) for the amount due on said note, on account of the real estate descended to the said Mary and now in the possession of herself and husband; (2) that said tract of land be sold, and the proceeds thereof be applied to such judgment, and the costs of these proceedings; (3) for general relief.

To this complaint the defendants Jackson, as administrator as aforesaid, and Redfearn and wife filed a joint demurrer, upon the following grounds. * * * (3) Because "the complaint does not state

[5] Part only of the opinion is given.

facts sufficient to constitute a cause of action against these defendants Mary H. Redfearn and David T. Redfearn, in that there is no allegation of any promise, undertaking, contract, agreement, obligation, or liability, express or implied, in law or in equity to pay the amount of the note sued upon. * * *"

The third ground of demurrer cannot be sustained. In an action against the heir for the debt of the ancestor, on account of real estate descended, there is no necessity for any "allegation of any promise, undertaking, contract, agreement, obligation, or liability, express or implied," on the part of the heir to pay the debt. The obligation to do so does not arise from any promise or undertaking, either express or implied, on the part of the heir to pay the debt, but upon the ground that he is in possession, as heir, of certain property liable for the payment of the debt. This conclusively appears from the fact that his liability only extends to the value of the property descended, even though it may be much less than the amount of the debt; whereas, if his liability arose from any promise or undertaking to pay the debt, it would extend to the whole amount of the debt, regardless of the value of the property which he took by descent. As to the absence of any allegation of any "obligation or liability" on the part of the Redfearns to pay the debt, it is obvious that such an allegation would be a mere legal conclusion from the facts stated, and therefore not only unnecessary but improper, as the well settled rule is that facts, and not legal conclusions, must be stated in pleadings under the Code. * * *

The judgment of this court is that the order overruling the demurrer be affirmed, with leave to the defendants to answer within 20 days after written notice to their attorneys of this decision, upon payment of the costs which had accrued up to the date of said order, to be taxed by the clerk of the court of common pleas for Chesterfield county.

CHAPTER IV

BREAKING DESCENT

SECTION 1.—BY DEED

If a man be seised of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh backe an estate to him and to his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherite.

Co. Litt. 12 b.[1]

KIHLKEN v. KIHLKEN et al.

(Supreme Court of Ohio, 1898. 59 Ohio St. 106, 51 N. E. 969.)

MINSHALL, J.[2] The land in question was devised to Henry Kihlken, now deceased, by his father; and he conveyed it to his brother John in 1888, on a written agreement that it was to be reconveyed on request. There was no real consideration for the conveyance, but it was done for a purpose we will not now consider. Before his death, Henry made the request, but died before a reconveyance was made. Thereupon John conveyed the land to Henry's widow, believing at the time that under the trust this was in accordance with his duty. This presents the first aspect of the question arising upon the facts as found. The claim of the plaintiffs below is that by reason of the fact that the land in question was devised to Henry by his father, and that Henry died without issue, it should descend to them as ancestral property, under section 4158, Rev. St., notwithstanding the conveyance to John and by John to Henry's widow. This we think is erroneous. Had John, as requested, conveyed to Henry just

[1] "But here Lord Coke must be understood to speak of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land, and the second regranting the estate to him. For if in the first feoffment the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses and the feoffment was not on such a consideration as to raise a use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his ancient use and not by purchase." Hargrave & Butler's note. See Holme v. Shinn, 62 N. J. Eq. 1, 6–8, 49 Atl. 151 (1901).

[2] The statement of facts is omitted, and part only of the opinion is given.

before his death, the immediate title of Henry to the land would have been the deed of John, and not the devise of his father.

In Brower v. Hunt, 18 Ohio St. 311, after partition had been made between brothers of land devised to them by their father, two of them (Jacob and Thomas) exchanged the lands each had received in the partition, by a reciprocal execution of deeds. There was no other consideration received by either for his conveyance than the land received from the other. The court held that by this exchange the lands lost their ancestral character. The reasoning is stated as follows by White, J.: "The title mentioned in the statute is the title under which the intestate immediately holds. The title to these lands came to Thomas by deed of conveyance from Jacob, and the character of the consideration cannot alter the fact, and make that a title by devise from the ancestor which was in fact a title by deed from Jacob." It is true that in partition, though effected by deeds, it is held to be different, because partition acts only on the possession, and not on the title. Partition does not change the character of the title. Freeman v. Allen, 17 Ohio St. 527; Carter v. Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757.[3]

We are unable to see why the reasoning in Brower v. Hunt does not apply with equal force to the case before us. Had the conveyance been made by John to Henry in his lifetime, as requested, he would have died seised of them as nonancestral lands, under the deed, for whatever previous equity he had would have been merged in the deed; and the lands would have descended to his wife, under section 4159, Rev. St., as an absolute estate in fee simple. It is said in Stem-

[3] In Carter v. Day, 59 Ohio St. 96, 101, 51 N. E. 967, 968, 69 Am. St. Rep. 757 (1898), the court said: "A partition of land by action, the authorities maintain, creates no new title to the shares set off to the parceners in severalty. While its effect is to locate the share of each in his allotted parcel of the land, and extinguish his interest in all the others, the title by which he holds his divided share is the same as that by which his undivided interest in the estate in common was held. Tabler v. Wiseman, 2 Ohio St. 208; McBain v. McBain, 15 Ohio St. 337, 86 Am. Dec. 478. The effect upon the title is different where, in such proceeding, it is found impracticable to divide the land among the tenants in common, and there is an election by one or more of them to take the land or some parcel of it at the valuation returned by the appraisers. The grounds of the distinction are satisfactorily stated in Freeman v. Allen, 17 Ohio St. 527, and need not be repeated here. But no satisfactory reason can be assigned why partition by metes and bounds among tenants in common, by the interchange of mutual releases, where each one receives no more than his proper share of the land, should have any different effect upon the title from that of a like partition under the statute. The former is a convenient and less expensive mode of attaining the same result, and the difference is in the method only, and not in the legal consequences. The latter is not less effectual than the former in extinguishing the interest of each parcener in the parcel allotted to the others, and in transferring to each the interest of the others in his parcel. The controlling fact common to both is that each parcener receives in severalty no greater estate than he before held in common." See Conkling v. Brown, 8 Abb. Prac. (N. S., N. Y.) 345 (1870).

bel v. Martin, 50 Ohio St. 495, 525, 35 N. E. 208, 213: "The descent of real estate is controlled by the legal title, and when the legal and equitable title unite in the same person the latter becomes merged in the former, and does not descend separately. The legal title draws to it the whole estate, and carries it in the same channel of descent as if the equitable estate had never existed." So, in Patterson v. Lamson, 45 Ohio St. 77, 12 N. E. 531, the same principle was applied. There, a father, desiring to make an advancement to his daughter on the eve of her marriage, purchased a tract of land, paying therefor $6,000, and caused the deed to be made directly to her. On her death without children, the land was held to be nonancestral, because the immediate title under which she held the land was the deed of the person from whom her father purchased it. Hence John did not mistake his duty under the trust when he conveyed the lands to Henry's wife; for it was his duty to convey them, if there was any in the premises, to the person that would have inherited them had the reconveyance been made to Henry. There is no room for a question of good faith or fraud on the part of the owner of ancestral lands in changing their character. He has, during life, the power to dispose of them as he pleases; and it is only where he does not, and dies seised of them, without issue, that his brothers and sisters take any estate whatever in them. They simply take in the character of heirs, and not otherwise.

In Indiana it appears that the surviving wife of a deceased husband inherits one-third of his lands in fee simple, subject to the provision that, if she again intermarries, she cannot, during such marriage, alienate them; and, if she dies during such subsequent marriage, the lands go to the children of the husband, from whom the lands came. And in Nesbitt v. Trindle, 64 Ind. 183, it was held that a widow could change the heritable character of the lands descended to her from her deceased husband by a deed made without consideration to a third person, who, after she had remarried, reconveyed to her. She, as the court observed, had the power, before her remarriage, to dispose of the lands as she pleased; and whether she did so for a consideration, or not, was immaterial to the rights of her children by the former husband, from whom she derived title, for they, as heirs, had no vested estate in the lands while she remained a widow.

The second aspect of the question on the plaintiffs' right to recover arises upon the fact averred in the answer of the defendant, and found by the court to be true,—that the deed made by Henry to his brother John in 1888 was made for the fraudulent purpose of hindering and delaying one Catherine Miller in the collection of any judgment she might recover against him in a contemplated bastardy proceeding, and was accepted by John to assist him in this purpose. This, we think, is an additional reason why the plaintiffs below are not entitled to recover. It is too well settled in this state to need the cita-

tion of many authorities, that neither a grantor nor his heirs can have any relief in law or equity for the recovery of lands so conveyed. Trimble v. Doty, 16 Ohio St. 119; Robinson v. Robinson, 17 Ohio St. 480; Vanzant v. Davies, 6 Ohio St. 52; Barton v. Morris, 15 Ohio, 408, 431; Tremper v. Barton, 18 Ohio, 418, 422. * * *

Therefore, judgment reversed, and judgment for the widow, quieting her title.

HIGGINS v. HIGGINS et al.

(Supreme Court of Ohio, 1897. 57 Ohio St. 239, 48 N. E. 943.)

John Higgins verbally agreed with his son James to sell and convey to him a tract of land, in Wyandot county, containing about 200 acres, for the sum of about $6,000, to be paid by James to his father; and, upon full payment being made, the father agreed to make and deliver to the son a deed for the land. Possession was delivered to the son, and he made valuable and lasting improvements. The father signed and acknowledged a deed to James for the lands, but retained possession thereof, and the same was never delivered, and it was not intended to be delivered until the balance of the purchase money should be paid. James, the son, died intestate in 1878, still owing his father $2,200 of the purchase money. James left surviving him Josephine Higgins, his widow, and Darlton Higgins, then an infant, his only child and heir at law. He also left surviving him the defendants in error Ransom Higgins, his only brother, and Lavina Wonder, his only sister.

After the death of James Higgins, the guardian of his son Darlton brought an action in the court of common pleas against John Higgins, the father of James, to compel a conveyance of the land to Darlton, and the court found that there was still due and unpaid the sum of $2,200 of the purchase money, and "ordered and adjudged that within 10 days from the rising of this court the said John Higgins convey said real estate to the said Darlton Higgins in fee simple, subject to said dower estate, by a good and sufficient deed, and that, in default thereof, this decree operate as such conveyance, and that within 30 days from the rising of this court the said plaintiff pay the said John Higgins the said sum of $2,200, and interest thereon from the date of this decree," and awarded execution. The guardian of Darlton Higgins sold 40 acres of the land under proceedings in the probate court, and out of the proceeds of the sale paid John Higgins the remainder of the purchase money, $2,200, and interest; but John, the grandfather of Darlton, never conveyed the land by deed, but allowed the decree of the court to operate as a conveyance of the land. In the year 1890, Darlton Higgins died intestate, leaving surviving him his mother, Josephine Higgins, but no widow, child, brother, or

sister, either of the whole or half blood. His mother remained in possession of the premises, and claims that the lands came to Darlton by purchase, and ascended to and vested in her at his death, under the statute of descents; and she brought her action against the defendants in error to quiet her title.

The defendants in error, the brother and sister of James Higgins, deceased, claim that the lands came to Darlton Higgins by descent from his father, James Higgins, deceased, and that Josephine, the widow of James, has only a life estate in the lands, and that after her death the lands will belong to the defendants in error in fee, under the statute of descents. The circuit court, on appeal, found in favor of the defendants in error, and quieted the title in them, subject to the life estate of Josephine. Thereupon Josephine filed her petition in error in this court, seeking to reverse the judgment of the circuit court.

BURKET, C. J. (after stating the facts). It is urged in behalf of defendants in error that under section 4158, Rev. St., the rights of James, whether legal or equitable, descended to his son Darlton. This is true, but James had only an equity; the legal title remained in his father, John. It is also urged that John made a deed to James for the lands, and retained the same undelivered, as a security for the unpaid purchase money. This is conceded, but the fact still remains that by retaining the undelivered deed he thereby retained the legal title to the lands in himself, and the guardian of Darlton had to pay $2,200 to obtain the legal title from John, and, upon paying that sum, the legal title passed from John, not by virtue of the undelivered deed, but by operation of the decree of the court, and thereby the legal title vested in Darlton by purchase, and not by descent.

As to John Higgins, it must be perfectly clear that he parted with the legal title to the lands by a sale thereof, and not by casting the title by descent on another; and it is equally clear that, if John parted with the legal title by sale, Darlton acquired the legal title by purchase. The legal title passing from John to Darlton could not go from John by sale, and be received by Darlton by descent. Being a sale of the legal title by John, it was a purchase by Darlton, and Darlton Higgins therefore received the legal title by purchase, and not by descent. True, he inherited from his father whatever equity the father had in the lands, but, in determining questions as to whether lands came by purchase or descent, regard is had to the legal title alone, uninfluenced by considerations of equity. Patterson v. Lamson, 45 Ohio St. 77, 12 N. E. 531; Stembel v. Martin, 50 Ohio St. 495, 35 N. E. 208.

The controlling facts of this case are conceded by the parties, and in such cases, upon a reversal, this court may proceed, and render such judgment as the circuit court should have rendered. Minnear v. Halloway, 56 Ohio St. 148, 46 N. E. 636. The circuit court erred in

applying the law to the conceded facts, and its judgment is therefore reversed, and a decree entered in favor of the plaintiff in error, quieting her title to said lands in fee simple. Judgment accordingly.[4]

SECTION 2.—BY DEVISE

EMERSON v. INCHBIRD.

(Court of King's Bench, 1701. 1 Ld. Raym. 728.)

In debt upon bond brought against the defendant as heir to his father, etc., riens per descent, pleaded, the plaintiff replied assets, and issue thereupon. And the evidence was, that the obligor, the defendant's father, devised to the defendant his son and heir certain messuages in Exchequer Alley in fee, but chargeable with an annuity or rent charge payable to the defendant's mother. And it was held by HOLT, Chief Justice, that these messuages descended to the defendant, and were assets. For (by him) the difference is, where the devise makes an alteration of the limitation of the estate, from that which the law would make by descent; and where the devise conveys the same estate, as the law would make by descent; but charges it with incumbrances. In the former case the heir takes by purchase, in the latter by descent. Trin. 13 Wm. III, B. R., Guildhall, London.[5]

[4] That an election to take as real estate property converted in equity into personalty operates as a new acquisition and breaks descent, was held in Burr v. Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48 (1836).

Compare, however, Cross v. Benson, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560 (1904), where a widow who elected to take the family residence under her husband's will was held not to lose thereby her constitutional right to have the husband's homestead exemption from forced sale under any process last as long as family occupation as a residence persisted. The question arose because by the state statute the right to devise was "subject nevertheless to the rights of creditors."

[5] See Kinney v. Glasgow, 53 Pa. 141 (1866), where one of several heirs was given by devise the whole property and yet was held to take the whole by descent under the state statute. But in Rice v. Burkhart, 130 Iowa, 520, 107 N. W. 308 (1906), a devise of the whole homestead to one of five sons was held to pass the property under the will, and not by descent. In Thompson v. Turner (Ind.) 89 N. E. 314 (1909), a widow was held to take by descent and not by devise.

On whether heirs take by descent or by purchase under a will, see 13 Prob. Rep. Ann. 412, note.

BIEDERMAN v. SEYMOUR.

(High Court of Chancery, 1841. 3 Beav. 368.)

The Master of the Rolls [Lord Langdale].[6] In this case the question reserved was, whether the real estate which the testator devised to his heir at law, is to be taken as real assets, for payment of debts, in priority to real estates, by the same will devised to other persons.

The devise to the heir is made subject to the payment of an annuity of £50 to the testator's sister during her life, and after her death to the payment of £1,000 to her two children.

Notwithstanding the devise, and notwithstanding the charges, the heir takes by descent. Chaplin v. Leroux, 5 M. & S. 14 [and see Fearne's Posthumous Works, 229]. For the purpose of making him take otherwise than by descent, the devise is said to be void; and it is argued for the defendants that the devise is void for all purposes, that no intention can be applied to it, that the attempted devise must be treated as a mere nullity, and the estate therein comprised be considered merely as descended estates, and therefore as assets to be applied for the payment of debts, in priority to estates effectually devised.

But whatever may be the origin of the rule, which gives to the heir by descent, that which the testator has intended to devise, whether the rule be derived from the supposed application of a principle that a man shall not have by gift that which is his own without gift, as some have supposed, or whether the rule be adopted for the benefit of third persons, as of the lord for the preservation of tenure, or of creditors for the payment of their debts, or simply, as Mr. Justice Bayley said in Chaplin v. Leroux, because it is convenient that the property should be assets in the hands of the heir, there seems to be no reason, why, as against the heir, the rule should be extended further than the principle requires.

It cannot be said of estates expressed to be devised to the heir, as of estates not mentioned in the will, that they are "quite out of the scope of the testator's intention, perfectly beside and independent of it" (2 Bro. C. C. 262); it is indeed clear that an estate which the testator says he devised to the heir, is within the testator's intention, and meant to be a benefit to the heir. There is nothing illegal in that intention, and if the rule be founded on the regard due to third persons, as creditors or otherwise, there seems no reason for its application between the heir and other objects of the testator's bounty; and if the effect of the devise be to procure for the heir a contribution from the other devised estates towards payment of debts, which would otherwise have had to be borne by descended estates alone, it cannot

[6] The statement of facts is omitted.

be said that the heir obtains by gift something which was his own, without gift.

Courts of justice ought to carry into effect the intentions of testators as far as they can consistently with the rules of law; and in this case, although the rule of law makes the devised estates assets in the hands of the heir, and the creditors may, therefore, resort to this estate in priority to others, and without being embarrassed with the necessity of seeking contribution from other devisees; yet, as it appears by the expressions which the testator has used, to have been his intention that the devisee, who is heir, should partake of his bounty as well as other devisees, there seems to be no reason why, without prejudice to the claims of creditors or others, the heir should not enjoy the like benefit which is given to other devisees, or why those who claim under the will, and do not appear to be more objects of the testator's bounty, should be permitted to defeat the expressed intention in favor of the heir.

I do not think that the testator's intention can be excluded from the consideration of this question. The intention is not to prevail against the rule of law for the benefit of third persons. A testator cannot, as against creditors, exempt his personal estate from payment of his debts, or prevent his real estates from being assets, by devising them to his heir; but we may collect from his will an intention, that, as amongst those claiming under the will, the personal estate, or any portion of the real estate, shall be exonerated; and if there be an equal intention to give to devisees named, and the gift must be encroached upon by the liability of the subjects of them to pay debts, I think the doctrine that the heir, who is devisee, shall take by descent, does not afford a sufficient reason for saying, that the burden of the debts should not be borne ratably by the devisees, although one of them is heir, and I am of opinion that although the creditors have a right to resort to the estate devised to the heir, in priority to the other devised estates, yet that the heir will be entitled to contribution from the other devisees to the extent in which his estate may be exhausted by debts.

DAVIS v. KIRK.

(High Court of Chancery, 1855. 2 K. & J. 391.)

William Harding, by his will, dated in 1845, gave and devised all his freehold and copyhold estates to Anthony Davis, his heirs and assigns, to hold the same unto and to the use of the said Anthony Davis, his heirs and assigns, upon trust to sell all those three closes therein specifically described, and to stand possessed of the moneys to arise from such sale, upon trust to pay all the said testator's debts, funeral and testamentary expenses; and in the next place to pay the residue thereof to the said testator's wife, Ann Harding; and as to all the

rest, residue, and remainder of the said testator's real estate thereinbefore given and devised to his said trustee, upon trust to pay the rents and profits thereof unto the said Ann Harding for her life; and, after her decease, upon trust to convey the said residue of his the said testator's real estate unto such person as should answer the description of his heir at law; and the said testator appointed the said Anthony Davis executor of his said will.

The testator died shortly after the date of his will, and the said Ann Harding, his widow, died in 1853.

At the time of his death, the testator William Harding was seised in fee of copyhold lands besides those mentioned in the will, which had descended to him ex parte materna, and these were now claimed by his heir at law, and also adversely by his heir ex parte materna.

Vice Chancellor Sir W. PAGE WOOD. I do not think that there is any doubt about this case. I have been looking at the case of Harris v. The Bishop of Lincoln, 2 P. Wms. 135. The report of it is in the shape of an argument between the bar and the court, counsel making an observation and the court answering it. I find there "it was objected, that, if the will should be construed in such manner as to entitle the heir of the mother's mother to the estate, such will would be void and nugatory, and the testator all this while would be doing of nothing, because, without any will, the premises would go to the heir of the mother's mother, who was the heir at law to this estate, the heir of the mother's father having none of the blood of the first purchaser. To which the court said, that the testator giving by his will several annuities and charities, and then saying that the residue of the profits should go to the right heirs of the mother's side, it was the same thing as if he had said, 'so far I dispose of my estate, and let so much of it go from my heir who otherwise would have had it, but I will not dispose of it any further from the heirs at law of the mother's side, whence it came, and where it would go in case I should not give it away.'" In other words, the court treated it as not being a devise at all, but considered that the heir took by his better title; and that was the principle of the decision.

I think that the answer to the case of Godbold v. Freestone, 3 Lev. 406, which is the only case that touches this, is, that the use is the old use. Here the devise is an express devise, which vested the whole fee simple in the trustees, and gave it away from the heir. The whole estate is devised away from the heir, and the trustees are left to deal with the legal fee simple, and to convey it to such person as should answer the description of the testator's heir at law. The expression "heir at law" is somewhat strong; but, independently of that, the fact of the testator having devested the inheritable quality of the estate by breaking the descent entirely, and giving the estate to the trustees, and leaving them to find out the heir, has put them under an obligation to look upon the heir as a persona designata, and they cannot regard the inheritable quality of the estate, but they must find out

the person who answers the description of heir at law of the testator. I think that there is not any authority precisely in point; but the principle must be, that, when once the descent is broken by a devise of the whole fee simple to trustees, upon trust to convey it to the testator's heir, they are bound to convey it to the person who is heir of the testator according to the common law.

ELLIS v. PAGE.

(Supreme Judicial Court of Massachusetts, 1851. 7 Cush. 161.)

BIGELOW, J. This is a bill in equity in the nature of a bill of interpleader, brought by the executors of the last will and testament of Ephraim Marsh, against sundry persons, legatees and heirs at law of said Marsh.

The facts, as they appear by the bill, answers and documents in the case, are substantially as follows: Ephraim Marsh, the testator, died in the year 1837, leaving a will and codicil, which were duly approved and allowed, March 22, 1847. In and by said will, he devised a part of his real estate, in different proportions, to his children and other relations in fee, and a part to his executors, in trust for his children and other persons. Among that part of his real estate devised in trust, were four dwelling houses in Fayette, and two lots of land in Knox street, in Boston, which were given to said trustees "their heirs and assigns forever, in trust to pay over the net rents and income thereof to" his "son Charles Marsh during his life, and, on his decease, to convey in fee, and pay to his children said houses and lots, or the proceeds thereof, in case they have been sold; and in default of such children, to convey and pay the same to his heirs at law." The trustees had full power, by the will, to sell at their discretion any of the real estate devised to them in trust for said Charles Marsh, but no sale had been made by them of any part of it at the time of the death of Charles Marsh, the cestui que trust, which took place in August, 1849, he leaving no issue. The testator also gave to sundry persons pecuniary legacies, amounting in all to $15,400, none of which have been paid by the executors. The personal estate of the testator falls short of paying debts and legacies, in the sum of about $2,200. The bill further states that, in order to settle the estate, it is requisite, either that said legacies, should be proportionably abated, or that the real estate devised to said trustees, in trust for said Charles Marsh for life, and on his decease without children to be conveyed in fee to the heirs at law, should be sold, and the proceeds applied, so far as may be necessary, to the payment of said legacies in full.

The bill prays that said legatees and heirs at law may interplead and settle their rights to said estate, under the direction of the court,

and that the executors may be advised how to proceed in the settlement thereof.

The question, whether the real estate devised to said trustees, by the clause of the will above cited, can be sold to make up the deficiency of personal estate and to pay the legacies in full, depends on the construction to be given to that part of the will. If it is to be considered as a specific devise to the heirs at law, after the death of Charles Marsh, so that they take by the will, then it is very clear, that it cannot be sold to pay legacies, for the reason that lands, specifically devised, are not subject to be sold for the payment of specific legacies. Scott v. Scott, 1 Eden, 458, 461; Hubbell v. Hubbell, 9 Pick. 561. See, also, Hays v. Jackson, 6 Mass. 151. But if the heirs at law do not take under the will by purchase, but take by descent as heirs, then so much of the real estate as is included in this devise would come within the provision of Rev. St. c. 71, § 20, and may be sold as undevised real estate, for the payment of said legacies.

It is a well-settled rule of real property that a limitation to an heir in a devise is void, and that the heir cannot be a purchaser. Co. Lit. 22b. Or, to state the rule more fully, if a man devises by his will his land to his heir at law and his heirs, in such case the devise, as such, is void, and the heir will take by descent and not by purchase, for the reason that the title by descent is the worthier and better title, by taking away the entry of those who might have a right to the land. Powell on Devises, 427, 430; 6 Cruise (Greenl. Ed.) 151; 1 Jarman on Wills, 67. And it makes no difference, as to the operation of this rule, that the land comes to the heir charged with payment of annuities or legacies, nor that the testator devises the land to one for life, remainder to his heir at law in fee, in which latter case the heir is in, on the termination of the life estate, by descent and not by purchase. So, too, it has been held, that the limitation to the heir, by devise in fee, after an estate tail, or the ingrafting of an executory devise, or the carving out of a contingent interest, or the limiting of the reversion in fee, or the alternate fee, to the heir at law, will not break the descent, and that when the estate devolves to the heir, he takes by descent and not by purchase. Powell on Devises, 427, 430; 1 Jarman on Wills, 67; Fearne's Post. Works, 128, 229; 1 Eden, 462, note; Doe v. Timins, 1 B. & Ald. 530; Manbridge v. Plummer, 2 Myl. & K. 93.

This rule of law, established in England by a long series of judicial decisions, was altered by statute of 3 & 4 William IV, c. 106.* But it has been fully recognized as the common law of this state, and has not been changed by statute. Parsons v. Winslow, 6 Mass. 178, 4 Am. Dec. 107; Whitney v. Whitney, 14 Mass. 90.

There would have been no difficulty in the application of this rule to the devise in question, if the estate had been given to the trustees

* On the English statute, see Owen v. Gibbons, [1902] 1 Ch. 636.

for the life of Charles Marsh, and, on his decease without issue, then in fee to the heirs at law. It would then have come within the letter of the rule. But the devise in this case was to the trustees and their heirs, who, on the death of the cestui que trust without children, are to convey the estate in fee to the heirs at law. Does this so change the estate which the heirs take, or so break the descent, that the rule is inapplicable to this devise? In considering this question, it is to be remembered that one of the great tests, by which to try the application of the rule, is to ascertain whether the tenure or quality of the estate which the heirs take is changed by the devise; i. e., whether they take an estate different in quantity or quality from that which they would have taken if the estate had not been devised, but had been left to descend to them. Fearne's Post. Works, 229. Apply this test to the estate which the heirs at law take in this case on the death of Charles Marsh without issue. They take a fee simple, precisely what they would have taken, if no will had been made. Perhaps a clearer test is given by Chancellor Kent, who says: "Strike out the particular devise to the heir, and if, without that, he would take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase." 4 Kent, Com. (6th Ed.) 507. Now it is very clear, that, on the conveyance by the trustees of the estate in question to the heirs at law in fee, as provided by the will, the heirs will take exactly what they would have taken if no will had been made.

On looking into the will, it is manifest that the testator intended, in case Charles Marsh died without issue, his heirs at law should at once take the estate in question equally in fee. But as it might become necessary, during the life of the cestui que trust, to sell some portion or all of the real estates devised in trust, the testator gave to the trustees a power to sell at their discretion, directing them, on the death of the cestui que trust, "if the estates shall have been sold," to pay the proceeds to the heirs at law, otherwise to convey to them in fee. The main purpose in devising the estates to the trustees and their heirs was to enable them to execute this power of sale, if necessary, and convey a good title to the premises. As this power of sale was not exercised by the trustees during the life of Charles Marsh, as it was to have been, if exercised at all, it would not perhaps be a very forced construction to say that, after his death, the devise came within those cases where it has been held that a devise to trustees and their heirs may be construed so as to vest only a life estate in the trustees. Doe v. Hicks, 7 T. R. 433; Curtis v. Price, 12 Ves. 89.

But without deciding this point, and assuming that, on the death of Charles Marsh without issue, the legal estate was still in said trustees, yet they held it only to convey it in fee to the heirs at law. The main purpose of the devise in trust had been accomplished. The heirs have the entire absolute interest in the estate, and can compel the trustees to convey the legal estate to them. 1 Cruise (Greenl.

Ed.) 418. The result is, therefore, the same as it would have been if the estate of the trustees had only been an estate pour autre vie remainder to the heirs at law in fee. The equitable estate being thus vested in the heirs at law with a right to an immediate conveyance of the legal estate in fee, we see no good reason why it should not be subject to all the legal incidents to which it would have been liable, if both the legal and equitable estates had been directly vested in the heirs at law by the terms of the devise. It has been often held to be of the utmost importance to preserve a strict analogy between legal and equitable estates, in all respects, for the reason that it would destroy the whole harmony of the laws of real property, if the legal estate was subject to one set of rules and the equitable estate to another. Wykham v. Wykham, 18 Ves. 423, note. A fortiori is this important and necessary, when the entire equitable estate is in the same persons who have also the immediate right to the legal estate.

On these principles, we think the real estates included in this devise cannot be considered as lands specifically devised by the will, but that they fall within the provisions of Rev. St. c. 71, § 20, and are liable to be sold for the payment of legacies. This conclusion, we are satisfied, carries out the intent of the testator, while at the same time it conforms to the rules of law. Decree accordingly.[7]

[7] "In Ellis v. Page, 7 Cush. 161 (1851), land was devised to trustees on certain trusts, and on failure of these trusts in trust to convey the land to the testator's heirs at law. The trusts failed, and it was held that the heirs took by descent, and not by devise, and that therefore, under a Massachusetts statute, the land could be sold to pay legacies. The decision, it is submitted, is unsound: (1) Because the devise of the legal estate to the trustees broke the descent (Davis v. Kirk, ante [2 K. & J. 391]); (2) because, even if the devise had been to the heirs directly, the doctrine of Biederman v. Seymour, ante [3 Beav. 368], is good sense and good law." 4 Gray's Cases on Property (2d Ed.) 29.

CHAPTER V

SHIFTING DESCENTS

SECTION 1.—POSTHUMOUS CHILDREN

HARPER v. ARCHER.

(High Court of Errors and Appeals of Mississippi, 1845. 4 Smedes & M. 99, 43 Am. Dec. 472.)

Mr. Justice CLAYTON.[1] This cause will have to be dismissed on account of a defect in the appeal bond. * * * But, as we had examined the points made in argument before this defect was perceived, it may save the parties future costs and litigation if we state the result of that examination. * * *

The right of the infant petitioner to a distributive share of the estate of his half-sister, is the prominent question in the cause. He was born eight months and twenty-one days after her death, and the point of inquiry is whether he was at that time in existence, so as to enable him to take.

Nine months is the usual period of gestation, and we think it right to place the commencement of fœtal existence to that period before birth. It was formerly a question at what time the embryo might be said to be alive, and quickening was selected as the surest test of life, and the earliest point of time at which it could be deemed to be in existence. But it is now settled, both in England and in this country, that from the time of conception the infant is in esse, for the purpose of taking any estate which is for his benefit, whether by descent, devise, or under the statute of distributions, provided, however, that the infant be born alive, and after such a period of fœtal existence that its continuance in life might be reasonably expected. A premature birth would not be regarded as of a character to give completeness to the inchoate right. Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; Swift v. Duffield, 5 Serg. & R. (Pa.) 38; 4 Kent, 248; 2 Atk. 117; Williams on Exec. 1066; Chitty, Med. Juris. 403; Beck, 317.

We are of opinion, therefore, that in this case the infant was entitled to take. The case, however, must be stricken from the docket; but the parties will have right to bring it up by writ of error, if they choose so to do.

Cause dismissed for want of jurisdiction.

[1] The statement of facts is omitted, and part only of the opinion is given.

DEAL v. SEXTON.

(Supreme Court of North Carolina, 1907. 144 N. C. 157, 56 S. E. 691, 119 Am. St. Rep. 943.)

BROWN, J. It appears from the case agreed that F. B. Wilson died intestate in 1881, seised in fee of the land in controversy. At the time of his death his wife was enciente, and within four months thereafter, on December 22, 1881, the plaintiff, Francis, was born. On October 22, 1881, two months before plaintiff was born, the widow, Deborah, and two daughters, Carrie L. and Maude L. Wilson, the only children then born, filed petition for partition and procured the lands of the intestate to be sold and the proceeds divided between them. W. E. Sexton became the purchaser, who conveyed to defendant for full value. The plaintiff was not made party to the proceedings by appointment of a guardian ad litem or otherwise, either before or after her birth, and has received no part of the proceeds of sale. She now seeks to recover her portion of the inheritance.

The question presented upon this appeal is important and perplexing, because of the fact that the defendant is a purchaser for value, and because of the great difficulty in purchasers at such judicial sales protecting themselves, having no knowledge of the existence of an unborn child in its mother's womb. If we hold, as we must, that the inheritance vested immediately in the plaintiff, while en ventre sa mère, upon the death of the father, the conclusion must follow that such inheritance ought not to be divested and the child's estate destroyed by judicial proceedings to which it was in no form or manner a party, and for which not even a guardian ad litem was appointed. It may be that our civil procedure is defective in not providing for such contingencies, but that is no reason why the vested estate of the unborn child in esse should be taken from it.

The general rule in this country and the acknowledged rule of the English law is that posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him, and for all the beneficial purposes of heirship a child en ventre sa mère is considered absolutely born. This has been the recognized law of this state since Hill v. Moore, 5 N. C. 233, decided in 1809, down to Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201, decided in 1905. It is also recognized generally by the text-writers and judicial decisions in other states. Kent's Com. (13th Ed.) vol. 4, p. 413; Washburn on Real Property (5th Ed.) vol. 3, page 16; Tiedeman on Real Property, § 673; 14 Cyc. 39, where the decisions are collected.

The statute law of this state treats the unborn child in its mother's womb with the same consideration as if born. By the seventh canon of descent (Revisal of 1905, § 1556), a child born within 10 lunar months after the death of the ancestor inherits equally with the other

children. By section 1582, an infant unborn, but in esse, is rendered capable of taking by deed or other writing any estate whatever in the same manner as if he were born. Campbell v. Everhart, supra. From most remote times the common law of England regarded such child as capable of inheriting direct from the ancestor as much so as if born. Doe v. Lancashire, 5 T. R. 49; Thelluson v. Woodford, 4 Vesey, Jun., 227; Harper v. Archer, 4 Smedes & M. (Miss.) 99, 43 Am. Dec. 474, where all the cases are collected.

The old writ of de ventre inspiciendo was devised by the courts for the purpose of examining the widow, and was granted in a case where a widow, whose husband had lands in fee, marries again soon after his death and declares herself pregnant by her first husband, and under that pretext withholds the land from the next heir. Such writ commanded the sheriff or sergeant to summon a jury of 12 men and as many women, by whom the female is to be examined "tractari per ubera et ventrem." 1 Black. Com. 456; Viner's Ab. vol. 21, p. 546. Of course, no such unseemly proceeding would be tolerated in this age, but the General Assembly could easily protect the unborn child as well as the innocent purchaser by prohibiting the sale of land for partition until 12 months after the intestate's death.

The question as to the status of the purchaser was considered by the Supreme Court of Kentucky, in the case of Massie v. Hiatt's Adm'r, 82 Ky. 314, in which it is held: (1) A child born within 10 months of the death of the intestate is entitled to a share in his estate, as if born and in being at the time of intestate's death. (2) The court had jurisdiction to sell the land on the petition of the guardian of the two other children; but the sale affected only their rights. The right of the unborn child could not in any wise be affected. (3) Having an interest in the land, she could not be deprived of it by any proceeding to which she was not a party, and may recover such interest from a remote vendee of the purchaser at the judicial sale. The Supreme Court of Illinois reaches the same conclusion, and says that a person must have an opportunity of being heard before a court can deprive him of his rights, and that an unborn child, not having been made a party, can recover from those claiming his title, as his rights are not cut off by the decree. Botsford v. O'Conner, 57 Ill. 72.

The case of Giles v. Solomon, in New York, 10 Abb. Prac. (N. S.) 97, note, is very much in point. In that case a bill to foreclose a mortgage executed by the deceased father was filed in January, 1841. A daughter was born to his widow in April, 1841, two days after foreclosure decree was entered. The daughter, not being a party to the foreclosure proceedings, brought her action in 1866 to redeem. The court held she was not barred by the decree of 1841, and permitted her to redeem her one-seventh by paying one-seventh of the mortgage and interest, and charged the purchaser with back rents. In South Carolina at one time the courts declined to proceed with a suit to partition the property of the ancestor until 12 months after his death,

so as to avoid the possibility of entering judgment which might conflict with the rights of an unborn child. As there was no statute on the subject, the courts of South Carolina discontinued this practice for some reason, and then held that a child en ventre sa mère must be regarded as a person in being who could not be bound by a judgment in partition to which he was not a party. Pearson v. Carlton, 18 S. C. 47.

It is true that Judge Freeman, in his elaborate note to Carter v. White, 101 Am. St. Rep. 869, 870, repudiates this doctrine, and says: "It is believed, however, that the rule cannot prevail, and that such a child must be regarded as not in being for the purpose of the suit, and as being represented by the parties before the court," etc. The authority cited by the learned annotator is the opinion of the Supreme Court of the United States in Knotts v. Stearns, 91. U. S. 638, 23 L. Ed. 252, which seems to sustain him. The fallacy in the position seems to us to be in supposing that the living children can represent the unborn child. It is not a case of class representation. The interests are conflicting, and not mutual. It is to the interest of the living heirs to make the division as short as possible, and therefore to keep out the heir who has not yet made his appearance.

The cases of Ex parte Dodd, 62 N. C. 97, and many similar cases, to Springs v. Scott, 132 N. C. 548, 44 S. E. 116, have no application here, as the object of a partition proceeding is to dissever the interests of the parties, and there is no class representation about it. The tenant in common who is not made a party personally, or by guardian ad litem, or in some legal way, is not bound by it. In the forcible language of counsel for plaintiff in their brief: "If the court could take what the law said was hers and sell and convey to another without her even having knowledge of it, or representation, our boasted 'process of law' doctrine is iridescent—a constitutional hallucination."

Affirmed.

RICHARDS v. RICHARDS.

(High Court of Chancery, 1860. H. R. V. Johns. 754.)

Vice Chancellor Sir W. PAGE WOOD.[2] A singular point arises in this case. The question is whether the qualified heir (if I may use that term to describe the person who is heir between the death of an intestate and the birth of a posthumous heir) is entitled to rents which are not actually received before the birth of the posthumous heir. Such questions are not of frequent occurrence, and it is singular that the point should have arisen so recently as it has done in another branch of the court.

[2] The statement of facts and the subsequent opinion of the Vice Chancellor on another point are omitted.

The ancestor in this case, Edward Priest Richards, who was entitled to certain estates in tail under a settlement, and to others in fee, died on the 12th of November, 1856. His posthumous child was born on the 23d of June, 1857. There were some peculiar circumstances with reference to a portion of the rents, but they do not affect the general question. All that it is necessary to say is that there was certain property of the deceased held, as it appears, by tenants from year to year, so that no entry could have been made by Mrs. Treherne [the qualified heir], and the question is: Who is entitled to the rents which accrued before the birth of the plaintiff? There is a very small amount of authority on the subject. There are certain expressions to be found in the old cases which perhaps afford some ground for the argument that the right of the qualified heir is limited to the rents actually received. The case in the Year Book of 9 Henry VI, the exact words of which are given in Watkins on Descent (page 185, note), was to this effect: A man, having issue a daughter, died, leaving his wife enceinte with a son; and the question was whether the posthumous child could recover from the daughter the intervening rents; and the decision was "that the son should not have an account or any other remedy for the intermediate rents, because the entry of the qualified heir was lawful until the son was born." It is not specified there that the rents had been actually received, but the judgment denies the right of the posthumous heir to an account or to any other remedy.

Then, in Goodtitle v. Newman [3 Wils. 516], Lord Chief Justice De Grey paraphrases the passage from the Year Book thus: "If a man has issue a daughter and dies, his wife being enceinte, the daughter may lawfully enter, and if she die her heir may enter and take the profits for the time; and afterwards if the wife, being enceinte by the ancestor paramount, is delivered of a son, the son may enter notwithstanding that the heir of his sister is in by descent; but he shall not have an action of account, or any remedy for the issues in the mean time before his birth, because that the entry was congeable until he was born."

It is not disputed that the posthumous heir has no remedy to recover the rents actually received before his birth; but in order to determine this case it is necessary to look into the principle on which the doctrine has been established that the qualified heir is entitled to take possession of the profits. The principle, which is very clearly stated by Watkins (page 185, note), in his comments on the case in the Year Book, seems to me to be the true one. He says: "When we consider that the daughter and her heir were justly entitled to the freehold until the son was born, it seems to follow of necessity that they were justly entitled also to the profits to enable them to discharge the services of the lands. While they were in possession of the feud they were certainly subject to the services, and the person discharging the services by right was certainly entitled to the profits."

That, I apprehend, is the real principle of the cases. The doctrine is of the strictest common-law character. A statute was passed to meet the case of posthumous children entitled in remainder. But the common-law rule was, that some one must come in as heir immediately on the death, in order that there might be no vacancy of the freehold. During the period, therefore, that the posthumous heir was not in existence to perform the duties of tenant, the person on whom the law threw the burden was in consequence held entitled to that which flowed from the burden, namely, the enjoyment of the rents and profits. That principle is clearly independent of any question whether the rents are actually received before the birth or not, and one can easily see why the Legislature, when dealing with the subject, did not alter the law in this respect. Until the modern change in the law of descent, a qualified heir might have remained in possession of an estate for many years. If a son, being the purchaser of an estate, died in his father's lifetime without having any brothers or sisters, he would have been succeeded by collaterals, and after an interval, possibly of many years, a sister might be born who would displace them, and she in her turn might be supplanted by a brother. It would have been singular in such a case to say that the successive takers should have no right to rents which had accrued during their respective tenancies, but which remained outstanding at their determination. The principle, therefore, I take to be that the qualified heir is entitled to the rents which accrue before the birth of the posthumous heir, whether actually received before that time or not.

Goodale v. Gawthorne [2 Sm. & Giff. 375] seems to be the other way, but the report is very singular. Goodale is stated to have died intestate as to certain estates, and one would have supposed that the legal estate descended. But the report goes on to say that there was a reference to the master to inquire what rents had been received by the trustees between the death of J. Goodale and the birth of the posthumous son.

Now, it does not appear what trustees there were; but of course, if the legal estate was in trustees, the whole doctrine as to the rights of the qualified heir was at an end, because it depends entirely upon strict legal principles, and had no other end than to keep the feud always full. I have assumed that, in the present case, the lands were occupied by tenants under leases or from year to year, because, unless there was an estate for years outstanding, the qualified heir must have entered, in order to acquire any right to the rents; but, as the contrary is not suggested, I presume that, so far as any question of entry is concerned, she had duly entitled herself to them.

There are several authorities bearing incidentally on this subject, and the Vice Chancellor, in his judgment in Goodale v. Gawthorne, refers to Doe v. Clarke, 2 H. Bl. 399, for the principle that an infant en ventre sa mère is considered as born for all purposes which are for his benefit.

This clearly cannot be so for all purposes, otherwise no question as to intermediate rents could ever have arisen, and it is difficult to see how the right of entry and distress could relate back to a time anterior to the birth. The law certainly is that the qualified heir is entitled, at any rate, to all the rents actually received, and consistently with this it cannot be said that the heirship relates back for all purposes.

Do the tenants owe a double duty? On the contrary, just as the qualified heir owes the duty to the lord, so the tenants owe their duty to the qualified heir. The tenant cannot owe a duty to the unborn heir, whom the law does not recognize as the person to perform the services incident to the estate, and therefore not as the person to enjoy the benefits of heirship. The case of Basset v. Basset [3 Atk. 203], which was relied on, really seems to be in favor of the infant. Lord Hardwicke held that case to be within the meaning of the statute, the estate being by way of remainder, though not to a person in the position expressly contemplated by the statute; but he distinctly notices that the statute says nothing about descent, and lays down in the very same case the doctrine, that, in the case of estates descended, the qualified heir is entitled to the intermediate rents. The present case comes within the second branch of that decision, and I shall make a declaration that all the rents which accrued during the period of suspense became the property of the qualified heir.[3]

SECTION 2.—OTHER AFTER-BORN HEIRS

CUTLAR v. CUTLAR.

(Supreme Court of North Carolina, 1823. 9 N. C. 324.)

This was a petition for partition, filed by Frederick J. Cutlar, Jane Cutlar, and Euphemia Cutlar, setting forth that in 1790 their father, Roger Cutlar, intermarried with Ellen Spillar, by whom he had issue, James Spillar Cutlar; that Ellen, wife of said Roger, died in 1794; that James Spillar Cutlar acquired, by purchase, certain lands, and died intestate and without issue, in August, 1797; that Roger Cutlar, in 1796, intermarried with Nancy Jones, mother of the petitioners; that the said Roger and Nancy Cutlar, in January, 1797, had issue born, a daughter, Anna E. Cutlar; that after the death of James Spillar Cutlar the petitioners were born, Jane in 1798, Frederick in 1801, and Euphemia in 1803. The petitioners claimed as co-heirs

[3] Local statutes should be consulted.

at law with Anna E. Cutlar of their half-brother James Spillar Cutlar, and claimed, each, one-fourth part of the real estate of which James died seised and possessed.

To this petition there was, in the court below, a demurrer, which was sustained, and plaintiffs appealed.

TAYLOR, Chief Justice. The petitioners are unquestionably entitled, each, to a fourth part of the estate of which J. S. Cutlar died seised; for notwithstanding the great and radical changes in the law of descent, which are introduced by our statute, the principle relative to posthumous and after-born children remains unaltered, and adapts itself to the course of descent instituted here. According to the British law, if lands are given to a son, who dies leaving a sister his heir, if the parents have, at any distance of time afterwards, another son, this son shall divest the descent upon the sister, and take the estate as heir to his brother. Nor is it uncommon for the same estate to undergo frequent changes by the subsequent birth of presumptive heirs who are nearer, before it finally rests upon an heir apparent. An estate may be given to an only child, upon whose death it may descend upon an aunt as the nearest presumptive heir, who may be deprived of it by an after-born uncle, on whom a subsequent sister may enter, and who will again be deprived of the estate by the birth of a brother. 2 Blackstone's Com. 209 (Chris. Note). A more precise analogy is presented by the case where a man has issue, a son and a daughter; the son purchases land in fee, and dies without issue, the daughter shall inherit the land; but if the father hath afterwards issue another daughter, she shall be coparcencer with her sister. Co. Litt. 11b. So in this state, if the son purchases land, and dies without issue, it descends for the present upon the brothers and sisters then being, but if any are subsequently born, they become equally entitled; and the same law must prevail relative to half-blood, where they are entitled to inherit. It follows, that the judgment sustaining the demurrer and dismissing the petition must be reversed, and the cause remanded for further proceedings.[4]

BATES v. BROWN.

(Supreme Court of the United States, 1866. 5 Wall. 710, 18 L. Ed. 535.)

Ejectment. It appeared from the agreed statement of facts that: 1. On the 29th of September, 1830, Alexander Wolcott bought of the state of Illinois certain lands, of which those in controversy were

[4] The rule in North Carolina seems to have been changed by statute in 1823. Caldwell v. Black, 27 N. C. 463 (1845). Though not so as to take away the rights of a child en ventre sa mere. Grant v. Bustin, 21 N. C. 77 (1835). See 1 Revisal 1905 N. C. § 1556, rule 7.

a part. At the time of the transaction he paid the purchase money, and received the usual certificate.

2. He died on the 30th of October, 1830, leaving a daughter, Mary Ann Wolcott, his only child, and his wife, Eleanor, him surviving. He left a will, duly executed, which contained the following provision:

"I further give and devise to my said wife, Eleanor M. Wolcott, and my said daughter, all my freehold estate whatsoever, to hold to them, the said Eleanor M. Wolcott and Mary Ann Wolcott, their heirs and assigns forever."

3. Mary Ann Wolcott, the daughter, died on the 16th of January, 1832, aged seven years, intestate and without issue.

4. On the 13th of May, 1833, Eleanor M. Wolcott conveyed to David Hunter, his heirs and assigns, with a covenant of general warranty, the premises in controversy.

5. On the 5th of July, 1833, a patent was issued by the Governor of Illinois for the land purchased by Alexander Wolcott, as before stated, to his "legal representatives, heirs and assigns."

6. Eleanor M. Wolcott, his widow, married George C. Bates on the 26th of May, 1836.

7. The plaintiff, Kinzie Bates, was the issue of that marriage, and was born on the 13th of April, 1838, and was the only child of his parents.

8. His mother died on the 1st of August, 1849, leaving her husband, George C. Bates, then and still surviving. The plaintiff, Kinzie Bates, claimed title as the heir at law of his deceased half-sister, Mary Ann Wolcott. * * *

Mr. Justice SWAYNE.[5] Mary Ann Wolcott, from whom the plaintiff in error claims to have derived his title by inheritance died nearly four years before his birth. During all the intervening time it is not denied that the title was vested in his mother and her grantee. Such was the effect of the statute. It is clear in its language, and there is no room for controversy upon the subject. Although born after the title became thus vested, he insists that upon his birth it became, to the extent of his claim, divested from the grantee and vested in him. His later birth and relationship to the propositus, he contends, is to be followed by the same results as if he had been living at the time of her death.

It is alleged that the rule of "shifting inheritances," in the English law of descent, is in force in Illinois, and must govern the decision of this case.

The operation of this rule is thus tersely illustrated in a note by Chitty, in his Blackstone: "As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an

[5] The statement of facts is abbreviated, and part only of the opinion is given.

after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother. It seems to be determined that every one has a right to retain the rents and profits which accrued while he was thus legally possessed of the inheritance. Harg. Co. Litt. 11; 3 Wils. 526."

Such is undoubtedly the common law of England. Watkins on Descents, 169. * * *

The Ordinance of 1787 contains a complete series of provisions upon the subject. They are the type and reflex of the action of many of the states at that time. The ordinance declared that the estates of persons dying intestate "shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and when there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood."

We find here not a trace of the common law. These provisions are diametrically opposed to all its leading maxims. We cannot infer from their silence that anything not expressed was intended to be adopted from that source by implication or construction.

The statute [of Illinois] governing the descent of real estate, already referred to, is also a complete code upon the subject of which it treats. It is to be presumed to cover every case for which the Legislature deemed it proper to provide. If the same question had come before us under the Ordinance, we should have said, with reference to the common law, conflict is abrogation and silence is exclusion. The spirit and aims of the two systems are wholly different. One seeks to promote accumulation; the other diffusion. One recognizes and cherishes the exclusive claim of the eldest son; the other the equal rights of all his brothers and sisters. The latter makes no distinction on account of age, sex or half blood. We apply to the statute also the remark that silence is exclusion. It speaks in the present tense—of the state of things existing at the time of the death of the intestate, and not of any change or different state of things which might occur thereafter. If the Legislature had designed to provide for this case, according to the rule insisted upon, we cannot doubt that they would have said so in express terms. The statute bears no marks of haste or inattention. We cannot believe it was intended to leave a rule of the common law so well known, and so important, to be deduced and established only by the doubtful results of discussion and inference. The draughtsman of the bill could not have overlooked it, and the silence of the statute is full of meaning.

One class of posthumous children are provided for. We see no

reason to believe that another was intended to be included, especially when the principle involved is so important. The intention of the Legislature constitutes the law. That intention is manifested alike by what they have said and by what they have omitted to say. Their language is our guide to their meaning, and under the circumstances we can recognize none other. We cannot go farther than they have gone. The plaintiff in error asks us, in effect, to interpolate into the statute a provision which it does not contain. Were we to do so, we should assume the function of the Legislature and forget that of the court. The limit of the law is the boundary of our authority, and we may not pass it.

The principle contended for was applied in the case of Dunn v. Evans, 7 Ohio, 169, pt. 1. The case is briefly reported and no arguments of counsel appear. It was also adopted in North Carolina, in Cutlar et al. v. Cutlar, 9 N. C. 324, and in Caldwell v. Black, 27 N. C. 463. No recognition of it is to be found, it is believed, in any other American adjudication.

The subject was elaborately examined by the Supreme Court of Ohio in Drake v. Rogers, 13 Ohio St. 21, and Dunn v. Evans was overruled. It came before the Supreme Court of Indiana in Cox v. Matthews, 17 Ind. 367, and received there also a thorough examination. The result was the same as in the last case in Ohio. The doctrine was repudiated.

The court said: "Under the laws of this state it is contemplated that such change of title from one living person to another is to be made by deed duly executed, rather than by our statutes of descent. * * * The feudal policy of tying up estates in the hands of a landed aristocracy, which had much to do with the shifting of descents as recognized by the English canons of descent, is contrary to the spirit of our laws and the genius of our institutions. It has been the policy, in this state, and in this country generally, not only to let estates descend to heirs equally, without reference to sex or primogeniture, but also to make titles secure and safe to those who may purchase from heirs upon whom the descent may be cast. Our laws have defined and determined who shall inherit estates upon the death of a person seised of lands. When those thus inheriting make conveyances, the purchasers have a right to rely upon the title thus acquired. If titles thus acquired could be defeated by the birth of nearer heirs, perhaps years afterwards, great injustice might, in many cases, be done, and utter confusion and uncertainty would prevail in reference to titles thus acquired. We are of opinion that the doctrine of shifting descents does not prevail under our laws, any more than the other English rule, that kinsmen of the whole blood only, can inherit."

The rule is sanctioned by no American writer upon the law of descents. Judge Reeve [on Descents, p. 74, Introduction], speaking of distributees, says: "I am of opinion that such posthumous chil-

dren who were born at the time of the distribution were entitled, and none others."

It is to be regretted that we have not the benefit of an adjudication by the Supreme Court of Illinois upon the subject.

Their interpretation—the statute being a local one—would of course be followed in this court. We have, however, no doubt of the soundness of the conclusion we have reached.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

CHAPTER VI

THE TRANSFER OF EXPECTANCIES

SECTION 1.—RELEASE TO ANCESTOR

HILTON v. HILTON.

(Supreme Judicial Court of Maine, 1907. 103 Me. 92, 68 Atl. 595.)

EMERY, C. J.[1] Joshua Hilton died intestate, leaving two children only as heirs, the petitioner and the respondent in this petition for a partition of the real estate of the deceased intestate. The respondent claims that the petitioner received from their father in his lifetime a gift and grant which the petitioner accepted and acknowledged in writing as a full advancement of all his distributive share in the real and personal estate of his father, and hence has no title to any part of the real estate sought to be divided.

In this state the whole subject-matter of the devolution of the property of a deceased intestate, including advancement, is governed by statute. The statute on descent of real estate (Rev. St. c. 77) provides (in section 4) that gifts and grants of real or personal estate to a child or grandchild shall be deemed an advancement when so expressed therein, or acknowledged in writing to be such (in section 5); that, when the value of an advancement is determined by the intestate in his gift or is acknowledged in writing, it (that value) shall be allowed in the distribution; and (in section 6) that, when the advancement in real or personal estate exceeds the recipient's share in the real or personal estate as the case may be, he shall receive so much less of the other on distribution as will make his whole share equal. These sections authorize a parent and child to fix for themselves the value of the advancement, and whenever they do so that value so fixed, large or small, is to be allowed in the distribution, even if it be fixed as the equivalent of the child's whole share in both the real and personal estate. It is thus competent for a child by accepting an advancement, however small, to debar himself from all right to share in his parent's estate, however large. Smith v. Smith, 59 Me. 214; Nesmith v. Dinsmore, 17 N. H. 515; Simpson v. Simpson, 114 Ill.

[1] The statement of facts is omitted, and part only of the opinion is given.

603, 4 N. E. 137, 7 N. E. 287; Palmer v. Culbertson, 143 N. Y. 213, 38 N. E. 199.

From the report in this case it appears that controversies had arisen between the petitioner and his wife on the one hand, and his father on the other. To adjust these controversies and prevent litigation over them, the parties signed and delivered each to the other a written instrument of agreement, releases, and conveyances, dated January 31, 1903, and herewith printed as a part of this opinion. By this instrument the father on his part released to the petitioner and his wife all demands of whatever nature he had against either of them, also released to them his rights in certain personal property in Norridgewock, and bound himself to give them a quitclaim of certain real estate there. It is not questioned that such quitclaim was duly given as a part of the transaction. As a result the petitioner received from his father property, or property rights, presumably of some pecuniary value and which would constitute an advancement if so intended, and such intention evidenced in writing as required by the statute. By the same instrument the petitioner and his wife on their part, and in consideration of the releases, conveyances, and agreements made therein by the father, acknowledged full satisfaction of all demands against him, his heirs, and personal representatives, and also "receipt in full of all demands they or either of them claiming as heir or otherwise have or may have against the estate of" the father. It is urged in argument by the petitioner that this latter clause had reference only to claims as heir of the petitioner's mother; the father having received some property inherited by the petitioner from his mother. The first clause, however, that acknowledging "full satisfaction of all demands" against the father, "his heirs and personal representatives," is most comprehensive, and completely covers all the petitioner's claims against his father as heir of his mother. The addition of the second clause after such a comprehensive clause, and the specification in it of "the estate" of the father as the estate to be freed from the petitioner's claim as heir, satisfies us that the petitioner in writing acknowledged the benefits accruing to him from the transaction to be an advancement.

The real value of the releases and property interests thus given and granted to the petitioner is, of course, quite problematical, but the petitioner accepted them in writing as the full equivalent of whatever share might otherwise come to him in his father's estate large or small. That was the value fixed by the parties and by them put in writing to satisfy the statute. The petitioner was of full age, of sound mind, and, so far as appears, acted freely and understandingly. In view of the situation at the time, he may have deemed his chance of receiving anything from his father's estate by will or descent as very slender and with good reason have preferred the arrangement made in the writing. He was authorized by the statute

to make such an arrangement in writing, and we think he has done so, and thereby received in his father's lifetime what he acknowledged to be his full lawful share in his father's estate. * * *

Petition dismissed, with costs.[2]

SECTION 2.—CONVEYANCE TO THIRD PERSONS

McCLURE v. RABEN.

(Supreme Court of Indiana, 1890. 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477.)

OLDS, J.[3] [After stating that in this suit for partition one Raben, by amended cross-petition, set up that Joseph McClure, by deed which stated that he "does hereby grant, bargain, sell and convey," conveyed to Samuel D. McReynolds, his heirs and assigns, forever, the real estate sought to be partitioned, "or all the estate, right and title that the said McClure may have in and to the same at the death of his mother, the widow of John McClure, deceased, as one of her heirs at law," that the said McReynolds conveyed to Raben, and that the mother of McClure was dead, and after noting that a demurrer by Joseph McClure to this amended cross-petition was overruled, the learned Justice continued:]

The question presented is as to whether or not the sale and conveyance by Joseph McClure of his expectant interest in the real estate owned in fee simple by his mother, and of which she was in possession at the time of the sale, is valid either in law or in equity, so as to pass the title thereto to his grantee on Joseph's survival of his mother.

[2] See Brands v. De Witt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909 (1888); In re Simon's Estate, 158 Mich. 256, 122 N. W. 544 (1909). In In re Garcelon, 104 Cal. 570, 38 Pac. 114, 32 L. R. A. 595, 43 Am. St. Rep. 134 (1894), the rule was adhered to despite a statute which provided that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind" and "cannot be transferred." See, also, Estate of Edelman, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231 (1905). But see Headrick v. McDowell, 102 Va. 124, 127, 45 S. E. 804, 65 L. R. A. 578, 102 Am. St. Rep. 843 (1903), where the court says that "upon the death of the ancestor the descent is cast by operation of law upon the heirs, and the personalty passes in accordance with the statute of distribution," save only that an advancement must be brought into hotchpot. To the same effect is Elliott v. Leslie, 124 Ky. 553, 99 S. W. 619, 124 Am. St. Rep. 418 (1907).

In Simpson v. Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287 (1885), the acceptance by B. of property in full satisfaction of his share as prospective heir of his father A.'s estate kept B.'s children from getting anything from A.'s estate, although B. died before A. See, also, Quarles v. Quarles, 4 Mass. 680 (1808). But see Buck v. Kittle, 49 Vt. 288 (1877). On the validity of transactions between an heir and his ancestor relating to the former's expectancy, see 32 L. R. A. 595, note; 65 L. R. A. 578, note.

[3] Part only of the opinion is given.

The broad question is presented as to whether a child, during the lifetime of his father or mother, can make a valid sale and transfer of an expectant interest in the real estate at the time owned by and in the possession of the parent, as in this case. It is conceded that the deed in this case contains no covenants of warranty by which an after-acquired title would pass to the grantee, but it is contended on behalf of the appellee that the cross-complaint shows the sale to have been made in good faith, and for a valuable consideration, and without fraud, and that it is valid in equity, and that the grantee is entitled to have it specifically enforced on the estate vesting in the grantor. In this contention of the appellee we cannot concur.

It is a general rule that a sale in the absence of property conveys no title. There must be something to sell or else there can be no sale. It is conceded that the rule which applies in case of a deed of general warranty, whereby the heir would be barred from setting up a subsequently acquired title, does not apply; and applying the rule applicable to quitclaim deeds, and treating the conveyance in this case as such, the heir is not estopped from setting up the subsequently acquired title. * * *

The identical question involved in this case was decided by the Supreme Court of Ohio in the case of Hart v. Gregg, 32 Ohio St. 502, and it was held that the conveyance by a son of his expectancy in land owned by his father, which would descend to him if he survived his father, and the latter should die intestate, owning the same, is the conveyance of a naked possibility, not coupled with an interest, and passes no estate or interest in the land; that such a conveyance does not operate to defeat the grantor's title afterwards acquired by descent, except by way of legal or equitable estoppel; and that if such conveyance contains no covenants of warranty or recitals, and there are no acts of the grantor amounting to an equitable estoppel, he is not estopped from asserting an after-acquired title. In that case it is said by the court: "In the deed before us, as there are no covenants of warranty, nor any recitals of fact that he had any title, or any right to make the conveyance, there is nothing that would estop the grantor, either at law or in equity, from setting up an after-acquired title, where, as in this case, there is no possession under the deed, and no charge of fraud in the transaction." See Boynton v. Hubbard, 7 Mass. 112.

Indeed, many of the authorities which assert that such conveyances may be upheld and enforced by courts of equity declare that the onus is upon the purchaser to show that the transaction was a bona fide one, and based upon a full consideration, and that the ancestor from whom the estate is expected was informed of and acquiesced in the sale, and that inadequacy of consideration alone is sufficient to avoid the contract. Even the enforcement of them, under such circumstances, is regarded of doubtful propriety.

Story, in his work on Equity (1 Story, Eq. Jur. [12th Ed.] § 328),

says: "Let us now pass to the consideration of the third class of constructive frauds, combining in some degree the ingredients of the others, but prohibited mainly because they unconscientiously compromit or injuriously affect the private rights, interests, or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties, or intentions of third persons." Again it is said (section 333): "But the great class of cases in which relief is granted under this third head of constructive fraud is that where the contract or other act is substantially a fraud upon the rights, interests, duties, or intentions of third persons. And here the general rule is, that particular persons in contracts and other acts shall not only transact bona fide between themselves, but shall not transact mala fide in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it. And as the rest of mankind besides the parties contracting are concerned, the rule is properly said to be governed by public utility." Section 334: "It is upon this ground that relief has been constantly granted in what are called 'catching bargains' with heirs, reversioners, and expectants during the life of their parents, or other ancestors. Many, and indeed most, of these cases, as has been pointedly remarked by Lord Hardwicke, have been mixed cases, compounded of almost every species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting, from weakness on one side and usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and from resorting to them for advice, which might have tended to his relief and also reformation. This misleads the ancestor who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoils beforehand." See, also, sections 335, 336. It is laid down as a rule that "it will be sufficient to make the purchase unimpeachable, if a fair price, or the fair market price, be given therefor at the time of the dealing." Section 336.

In treating of this subject, Pomeroy, in his work on Equity Jurisprudence (volume 2, pp. 473, 474, § 953), says: "Equity, therefore, treats such dealings with expectant interests as a possible fraud upon the heirs and reversioners who are immediate parties to the transaction, and as a virtual fraud upon their ancestors, life tenants, and other present owners." And it is further said: "But in every such conveyance or contract with an heir, reversioner, or expectant, a pre-

sumption of invalidity arises from the transaction itself, and the burden of proof rests upon the purchaser or other party claiming the benefit of the contract to show affirmatively its perfect fairness, and that a full and adequate consideration was paid—that is, the fair market value of the property, and not necessarily the value as shown by the life tables." The same rule is applied to this class of cases whether the grantor be an infant or an adult.

From the rule as laid down by Story and Pomeroy, and which we have quoted, it will be seen that such contracts are looked upon with suspicion, and that they are presumed fraudulent, and will not be enforced except it be clearly made to appear to be a perfectly fair transaction, and that the actual, full, and fair market value was paid for the property; and, indeed, before such a sale will be enforced, we think it also within the rule, and necessary to the enforcement of such a contract, to allege and prove that such contract and sale were made known to the ancestor or person from whom the estate is expected, and he put in full possession of the facts concerning such transaction, and his consent obtained to such contract, sale, or conveyance; that if not made known to him, it operates as a fraud upon him. We regard such contracts and conveyances against public policy. The grantor at the time has no property or interest in the property of his father or ancestor which he can sell or convey, and none which the grantee can purchase. It is a mere gambling contract. It is wagering that the son or heir will survive the father or ancestor, and that the latter will not dispose of the property, and will die intestate, whereby the grantor will at some time in the future inherit an interest which he can then convey. It operates as a fraud upon the ancestor, and divests his bounty from the kin to a stranger. It encourages extravagance, prodigality, and vice on behalf of the heir, and in some instances might create an anxiety on the part of an avaricious or vicious purchaser for the death of the ancestor.

We are not prepared to say that some case might not arise in which it would be inequitable not to enforce a contract made with an heir for his future prospective inheritance in the estate of his ancestor, but we do not think the facts alleged in the cross-complaint present a case entitling the cross-complainant to relief. It must, at least, be necessary in such a pleading to allege the facts showing the amount and value of the estate purchased, and the amount of the purchase money paid, and that such purchase money was the full and fair market value of the property at the time of the purchase. The cross-complaint is defective in that respect. We think it further necessary to the validity of such conveyance that it was made known to, and that the ancestor acquiesced in such sale and conveyance.

Judgment reversed, at costs of appellee, with instructions to sustain the demurrer to the cross-complaint, and for further proceedings in accordance with this opinion.

ELLIOTT, J. I concur in the conclusion that the cross-complaint is bad, but I do not fully assent to some of the propositions stated by the court, nor to all of the reasoning of the opinion. In my judgment, an heir apparent may convey an estate in expectancy, but, in order to enforce the conveyance, the purchaser must show good faith, and that he paid the fair value of the property conveyed. It is not enough to show that he paid the value of the estate considered as an estate in expectancy, but he must show that he paid the value of the property without reference to the uncertainty of the estate ever vesting. In other words, he must show that he paid the full value of the property, estimated as if the estate were absolute and fully vested, and without regard to any hazard resulting from the uncertain nature of the expectant estate. It is the value of the property, and not the value of the expectant estate, which the purchaser must pay. I think, too, that this rule applies where there is a warranty deed, or where the estate conveyed is specifically described, but that it does not apply where there is nothing more than a mere quitclaim deed.

It seems to me that the requirement of the law that the full value of the property shall be paid is a check so full and strong as to prevent fraud, and that an heir who secures the full worth of the property, valued as an absolute and vested estate, cannot avoid his conveyance, made when he was an heir presumptive.[4]

[4] See McCall v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335 (1895) (assignment held void at law and in equity). But see Steele v. Frierson, 85 Tenn. 430, 434, 435, 3 S. W. 649, 651 (1887), where Lurton, J., for the court, said: "Even at law the sale of an interest in the lands of an ancestor living has been enforced, but generally by aid of the operation of the doctrine of estoppel springing from the covenants in the deed. The argument that the assignment now under discussion [made in part payment of an antecedent debt] contains no covenants might be effective in a court of law; but, regardless of the doctrine of estoppel, such an assignment or sale is operative in equity as an equitable assignment of a future interest, and upon the expectancy being converted into a vested interest will be enforced by courts of equity." See, also, Clendening v. Wyatt, 54 Kan. 523, 38 Pac. 792, 33 L. R. A. 278 (1895); Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956 (1890); Fritz's Appeal, 160 Pa. 156, 28 Atl. 642 (1894); McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434 (1859).

A conveyance to a stranger, made by the prospective heir while the ancestor is alive, is held by some courts to be a fraud on the ancestor, if the latter is ignorant of the conveyance.

"The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff is to substitute him as a coheir with himself to his uncle's estate. The uncle is thus made to leave a portion of his estate to Boynton, a stranger, without his knowledge, and consequently without any such intention. This Lord Hardwicke calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice; and taking care,

by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the waste of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens. But when it is considered that a contract of this kind is a mere wager, in a case where there are no principles by which the value of the chances may be estimated, so as to ascertain whether it be unconscionable or reasonable, and therefore, if valid in any case, it may be valid in all cases, public policy has additional inducements to discountenance it, as dangerous to faith and fair dealing." Parsons, C. J., in Boynton v. Hubbard, 7 Mass. 112, 121, 122 (1810).

See, also, Gilpin v. Williams, 25 Ohio St. 283 (1874). The assent of the ancestor (Fitch v. Fitch, 8 Pick. [Mass.] 480 [1829]; Jenkins v. Stetson, 9 Allen [Mass.] 128 [1864]; Curtis v. Curtis, 40 Me. 24, 63 Am. Dec. 651 [1855]), or notice to him without objection on his part (Fuller v. Parmenter, 72 Vt. 362, 47 Atl. 1079 [1900]), dispenses with this objection; and in Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819 (1897), the knowledge and assent of the ancestor, who was insane, was held to be unnecessary. On the validity of a sale of an expectancy by a prospective heir, see 33 L. R. A. 266, note; 56 Am. St. Rep. 339, note.

PART III

THE PROBATE OF WILLS AND THE ADMINISTRATION OF ESTATES

CHAPTER 1

THE GRANT AND REVOCATION OF PROBATE AND OF ADMINISTRATION

SECTION 1.—THE JURISDICTION TO ISSUE LETTERS

In re ZEPH'S ESTATE.

(Supreme Court, General Term, Third Department, 1888. 50 Hun, 523, 3 N. Y. Supp. 460.)

INGALLS, J. In November, 1887, Edward Zeph was an inhabitant of Schenectady county, in this state. He was indicted, tried, and convicted of the crime of murder in the second degree, and sentenced to the state-prison for life, and is now in prison under such sentence. Fidel Zeph, the only brother of such convicted person, applied to such surrogate for letters of administration upon the estate of such prisoner, which were denied by the surrogate, upon the ground that he possessed no jurisdiction to grant such letters, as the said Edward Zeph was still living. We are convinced that the decision of the surrogate was correct.

The contention of the counsel for the appellant is that by force of such conviction and judgment thereon the said Edward Zeph became and is civilly dead, and that his estate became the subject of administration, the same as though he were actually dead. We are satisfied that the provisions of the Code of Civil Procedure, from which surrogates derive their authority to grant letters of administration, have no application to a case of civil death, but apply only to cases of actual death. It will be perceived by referring to section 2660 of the Code of Civil Procedure, and the following sections upon that subject, that whenever mention is made of the estate upon which ad-

ministration may be granted, the word "decedent" is employed; as, for instance, in said section 2660 the expression is found: "and of the next of kin of the decedent;" in section 2661, "that the decedent left no will." The same term is to be found in section 2663 and section 2665. We think that the word "decedent," as thus employed in framing the statute, was intended by the law-makers to be understood and applied in the usual and ordinary sense of the term. Webster defines the word "decease" as follows: "To depart from this life; to die." The word "decedent" is defined: "A deceased person."

There is nothing in the statute, which we discover, which in the slightest degree favors a construction that civil death was intended to be included as a ground for granting such administration. Indeed, the entire proceedings in regard to administering the estates of deceased persons seem to negative the idea that civil death was intended to be included within the cases provided for by such statute. Such right to administration should not be extended by implication, doubtful construction, or judicial legislation. If it should be deemed safe and judicious to include civil death as a ground for granting such letters of administration, the legislature must furnish the remedy, and not the court. The effect of imprisonment for life upon the civil rights of the prisoner was considered in Avery v. Everett, 36 Hun, 6; and upon appeal to the court of appeals the subject was elaborately discussed, and the decision of that court is to be found in 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368. We understand such decision to be, upon principle, adverse to the contention of the appellant's counsel herein.

It was suggested by such counsel, upon the argument, that the discussion of that question in the court of appeals should be regarded as obiter. We do not so regard it, as the question considered was involved in the case discussed by the members of the court, and concurred in generally by all the judges present, except Judge Earl, who delivered a dissenting opinion. Under such circumstances, we must regard such question as within the determination of that court in that case, and, so far as it applies upon the question under consideration in this case, as conclusive herein.

The order of the surrogate should be affirmed. All concur.[1]

[1] On the administration of the estates of persons civilly dead, see 1 Woerner's American Law of Administration (2d Ed.) § 213. Even if in In re Zeph's Estate, the state statute had provided for the administration of the estates of persons civilly dead, the question of the constitutionality of such statutes would remain. Bearing upon the latter question are the decisions as to the administration of the estates of living persons. The doctrines on that matter are well stated in New York Life Ins. Co. v. Chittenden, 134 Iowa, 613, 616 112 N. W. 96, 98, 11 L. R. A. (N. S.) 233, 120 Am. St. Rep. 444 (1907), as follows:

"It seems to be conclusively settled by adjudications that a probate court acquires no jurisdiction by proceeding to administer on the estate of a person on the ground that he is dead if in fact he is alive, and such proceedings are entirely invalid, and any judgments or orders made in pursuance thereof, and any action taken thereunder, are absolutely void as against the per-

GAY et al. v. SANDERS.

(Supreme Court of Georgia, 1897. 101 Ga. 601, 28 S. E. 1019.)

SIMMONS, C. J.[2] The paper upon which the defendant relied as giving authority for his becoming executor purported to be a last will and testament, but was attested by only one witness. As a will it was void. "All wills (except nuncupative wills) disposing of realty or personalty shall be attested and subscribed in the presence of the testator by three or more competent witnesses." Civ. Code, § 3272. And in the case of Thornton v. Chisholm, 20 Ga. 338, this court held that an instrument attested by two witnesses only was void

son who is erroneously adjudged to be dead. Without citing the many authorities supporting this proposition, it is sufficient to say that any such proceeding, if sustained, would result in depriving the person erroneously adjudged to be dead of his property without due process of law. Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896. But, in the exercise of its jurisdiction over property within the state, it may be provided that after the absence of the owner unheard of for a specified period such property may be administered upon in the same form of proceeding as is provided for administration upon the property of a person deceased, and such administration will be valid as against the absentee and all persons interested, although he is in fact not dead. Cunnius v. Reading School District, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125. Section 3307 of our Code provides for such an administration on the estate of one who has absented himself from the state and concealed his whereabouts from his family for a period of seven years, and under the decision last above cited we have no doubt that this section is constitutional and provides for a proceeding which may properly be resorted to in such cases, and which is conclusive on the absentee and those claiming under him. The administration granted as to the property of Jarvis was in accordance with the provisions of this section, and we think it was valid. Waldeck as administrator had the right, therefore, to receive from the plaintiff the proceeds of the policies on Jarvis' life so far as such proceeds were payable to his administrator."

A late case giving a statute for the administration of the estates of absentees retroactive effect is Savings Bank of Baltimore v. Weeks, 110 Md. 78, 72 Atl. 475, 22 L. R. A. (N. S.) 221 (1909).

The authorities are collected in 4 L. R. A. (N. S.) 944, note; 15 L. R. A. (N. S.) 651, note; 14 Am. & Eng. Ann. Cas. 148, note.

In Lavin v. Emigrant Industrial Savings Bank (C. C.) 1 Fed. 641 (1880), an ancillary administration in New York on the estate of a person who turned out to be alive was held to be ineffective to protect persons making payments to the ancillary administrator, although the original administration in Rhode Island was under a statute like that in New York Life Ins. Co. v. Chittenden, supra. That was because the New York statute contemplated the administration of the estates of decedents only.

COMMUNITY PROPERTY.—In the state of Washington, where community property is recognized, the whole community estate is subject to administration upon the death of either spouse, and not merely the half interest of the decedent. See Magee v. Big Bend Land Co., 51 Wash. 406, 99 Pac. 16 (1909), and cases cited. But the administration of only the undivided half of the one dying cannot be collaterally attached. Wiley v. Verhaest, 52 Wash. 475, 100 Pac. 1008 (1909). And it has been held that after an executor has been appointed under the will of the deceased husband disposing of his half interest in the community property, as by statute he may do, the court cannot grant, on application of the wife, administration of the whole community property. In re Guye's Estate, 54 Wash. 264, 103 Pac. 25 (1909).

[2] The statement of facts is omitted, and part only of the opinion is given.

as a will. A judgment of the court of ordinary, ordering the probate of such a paper, attested by one witness only, gives that paper no effect as a will in any proceeding in which its validity may be called in question. The court of ordinary is without jurisdiction to render such judgment, which is, therefore, void. "The will * * * had been proven and admitted to record, and yet it had no attesting witnesses, as appears from the probate itself. It is conceded that it had no subscribing witnesses. The will was, therefore, utterly void, and of no effect. It was competent, therefore, to move at any time to set aside the judgment of the ordinary admitting this paper to probate. It was a nullity upon its face, and in favor of such a judgment nothing can be presumed." Hooks v. Stamper, 18 Ga. 471. "A will attested by only two witnesses is void, and can derive no aid from probate and being admitted to record. The judgment of probate is not merely erroneous, but an absolute nullity on its face. No motion to set it aside is requisite, nor is it ever too late to urge its invalidity." Cureton v. Taylor, 89 Ga. 490, 15 S. E. 643.

2. While such a paper, though ordered to probate, is ineffective as a will, yet where certain heirs at law of an intestate agreed in writing to its probate as a will, and under such agreement it was so probated by the ordinary, and a named executor proceeded to dispose of the estate thereunder, such distribution would, because of the agreement, be binding on the heirs who were sui juris and consenting thereto, but minor heirs of the intestate would be in no way bound thereby. By the agreement, those heirs who (being at the time sui juris) entered into it are estopped to contest the validity of the paper probated, or to attack the authority of the executor to whose appointment they have by their agreement consented. Clearly, however, this cannot apply to minor heirs, even though they may have entered into the written agreement, provided they revoke their act within reasonable time after their majority. A fortiori, a minor heir is not bound or estopped where he was not a party to the agreement in question, even though he may, during his minority, have acquiesced in the arrangements made, and raised no objection to them. These minor heirs being not bound by the agreement, the defendant was, as to them, executor de son tort, and liable under section 3310 of the Civil Code. * * *

Judgment reversed. All the Justices concurring.

EWING v. MALLISON et al.

(Supreme Court of Kansas, 1902. 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299.)

POLLOCK, J.[3] John A. Whitcraft died at the residence of his nephew, Horace H. Standish, in Wyandotte county, on the 6th of January, 1898. At the date of his death he was the owner of two certificates of deposit, of $1,000 each, issued by the First National Bank of Emporia; also real estate and other personal property in Lyon county. For many years prior to his death Whitcraft had been a resident of Lyon county.

On the 19th day of January, 1898, Horace H. Standish filed his petition in the probate court of Lyon county, praying his appointment as administrator of the estate of Whitcraft. On the same day John W. Logan and others filed their petition praying for the appointment of W. F. Ewing as administrator of such estate. These petitions each alleged the death of Whitcraft, late of Lyon county, Kan., deceased; that he died leaving no last will and testament, so far as the petitioners knew or believed; and that he died seised of money in bank, mortgages, and real estate in Lyon county, Kan. On the 21st day of January there was a hearing upon these applications, and that of Standish for his appointment was denied, and that of Logan and others for the appointment of Ewing was granted. Ewing was appointed, letters of administration were issued to him, and he qualified and gave bond as such administrator.

Thereafter, on the 13th day of February, Standish made application to the probate court of Wyandotte county for probate of an alleged verbal will of Whitcraft, and for the appointment of defendant in error Mallison as administrator with will annexed. To this proceeding, Ewing, as administrator, appeared in the probate court of Wyandotte county, filed his plea in abatement, alleging his prior appointment and qualification as administrator by the probate court of Lyon county, and want of jurisdiction in the probate court of Wyandotte county to make the appointment prayed. Upon a hearing this plea was overruled, and it was found that Whitcraft was at the date of his death a resident of Wyandotte county. Thereafter an order was made admitting the nuncupative will to probate, and appointing defendant in error Mallison administrator with will annexed. No appeal was taken from the proceedings of either probate court.

This action was brought by Mallison, as administrator with will annexed, to recover from the receiver of the First National Bank of Emporia, then insolvent and in the hands of Morton Albough, re-

[3] Part only of the opinion is given.

ceiver, by order of the comptroller of the currency, upon the certificates of deposit. Ewing, as administrator, was made party defendant, and answered, setting up his appointment by the probate court of Lyon county, his qualification under such appointment, and his right to the funds of the estate. Plaintiff replied, pleading an adjudication by the probate court of Wyandotte county, and an estoppel of Ewing to claim under this appointment. There was judgment for plaintiff. Defendant Ewing brings error. * * *

It is a principle of universal application, essential to the orderly administration of justice, in order to avoid conflict between tribunals of coequal authority, that the court that first acquired jurisdiction shall be allowed to pursue it to the end, to the exclusion of others, and that it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal. * * *

The statute (Gen. St. 1901, § 2806) provides "that upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death." The words "inhabitant" and "resident" are usually synonymous. Bouv. Law Dict. subject, "Residence"; Lee v. City of Boston, 2 Gray (Mass.) 490. Hence but one court was possessed of jurisdiction to administer the estate of deceased,—the probate court of the county of his residence at the date of death.

But if it were possible to assume that either the probate court of Lyon county or the probate court of Wyandotte county might have rightfully acquired jurisdiction over this estate for the purpose of appointing an administrator or proving a will, the action taken by the Lyon county probate court being first in point of time, if in its nature judicial and that court in fact had jurisdiction, it will retain such jurisdiction to the end, to the exclusion of jurisdiction in the probate court of Wyandotte county, unless the appearance of the administrator appointed by the probate court of Lyon county in the probate court of Wyandotte county to contest the jurisdiction of that court may be held to have deprived the probate court of Lyon county of jurisdiction once acquired, or estops the administrator appointed by the Lyon county probate court from asserting nonjurisdiction in the Wyandotte probate court. That the action of a probate court in appointing an administrator of an estate is in its nature judicial, and, where jurisdiction obtains, not subject to collateral attack, would seem to be well settled by this court. * * *

Upon authority, therefore, two propositions are clear: (1) The granting of letters of administration by a probate court is the exercise of judicial authority, and the letters granted, if regular in form, are prima facie evidence of the regularity of the prior proceedings; (2) such letters are void if the court making the appointment had no jurisdiction to grant the letters.

The controversy in the court below did not arise upon an appeal from an order revoking the letters of administration granted by either probate court. The letters of both contending parties stand unrevoked. As the case, however, arose upon the conflicting claims of two persons pretending to represent the estate, each holding letters of administration, and as, under the law, it is impossible for more than one probate court of the state to rightfully claim jurisdiction over the estate of a deceased resident, or be permitted to administer such estate, it was the duty of the trial court to determine which of the two contesting parties rightfully claimed the assets of the estate in litigation.

The essential jurisdictional facts required by the statute are (1) the death; (2) an estate to administer; (3) the residence or inhabitancy of the deceased at the time of his death. It is conceded the death occurred; an estate is left to be administered; hence, unlike prior cases in this court in which administration proceedings have been declared void, the jurisdictional facts warranting administration in some court stand admitted. The sole question in dispute, over which the conflicting claims to jurisdiction arose is, of what county was the deceased an inhabitant or resident at the time of his death? This identical question of fact, of necessity, must have been presented to and determined by the probate court of Lyon county, for, where jurisdiction depends upon the finding of a particular fact alleged or essential to support jurisdiction, the exercise of jurisdiction implies the finding of such fact. Erwin v. Lowry, 7 How. 172, 12 L. Ed. 655; Wyatt's Adm'r v. Steele, 26 Ala. 639. Again, the determination of this fact by that court was first in point of time. Its proceedings are in due form of law. A copy of the letters issued are found in the record. They are regular, and to this court and all other courts are prima facie evidence of the regularity of all prior proceedings including the jurisdiction of the court to issue the same.

If in the case at bar, as in the case of Bank v. Wilcox, 15 R. I. 258, 3 Atl. 211, 2 Am. St. Rep. 894, cited by counsel for defendants in error, it stood admitted in the record that Whitcraft was not in fact a resident of Lyon county at the date of his death, or if the record contained a finding of such fact from the evidence, a want of jurisdiction in the probate court of Lyon county would appear, and we would be justified in holding its proceedings void. But no such admission or finding appears in the record. True, it was found by the probate court of Wyandotte county that the deceased at the time of his death was a resident of Wyandotte county, and as a consequence the probate court of Lyon county was without jurisdiction. And because of such determination the trial court refused to receive any evidence as to the actual residence of the deceased at the date of his death, but held the proceedings in the probate court of Wyandotte county res judicata and conclusive. If, however, the proceedings in the probate court of Lyon county were not conclusive upon the question of jurisdiction in

that court, no more were the proceedings in the probate court of Wyandotte county, unless the proceedings in that court were affected by the appearance therein of plaintiff in error.

The place of residence, like the question of death or the existence of an estate to be administered, is a collateral, jurisdictional question of fact; and, the actual fact of residence by the deceased in the county of the court at the time of death being essential to uphold the jurisdiction of a probate court, it is not concluded by the decision of the court that such fact does exist, but it may be inquired into in a proper collateral proceeding for the purpose of showing want of jurisdiction in the court making the determination. This is the general rule as to judgments in this state. Mastin v. Gray, 19 Kan. 458, 27 Am. Rep. 149; Pray v. Jenkins, 47 Kan. 599, 28 Pac. 716.

The true rule appears to be: "Where the jurisdiction depends upon some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be averred of record, and was actually found in evidence by the court rendering the judgment. But on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the merits of the case, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without partly, at least, retrying the case on its merits, which is not permissible in a collateral proceeding unless other parts of the record show affirmatively that the finding cannot be true." 17 Am. & Eng. Enc. Law, 1084, 1085; Bank v. Wilcox, supra; Beckett v. Selover, supra [7 Cal. 215, 68 Am. Dec. 237].

We are therefore of the opinion, upon this branch of the case, that the district court erred in refusing to permit an inquiry into the actual residence of the deceased at the time of his death, and in holding the proceedings had in the probate court of Wyandotte county res judicata.

The remaining question, is plaintiff in error estopped from asserting jurisdiction in the court appointing him, and from denying the jurisdiction of the Wyandotte probate court? becomes easy of solution. If the Lyon county probate court had jurisdiction, the Wyandotte court did not have, and any proceeding therein, or order made, was void, and any participation therein was binding upon no one. On the other hand, if the probate court of Wyandotte county had jurisdiction, the proceedings therein were valid and conclusive because res judicata. Jurisdiction vests in the probate court of the county of the residence of the deceased at the time of his death. This essential, collateral, jurisdictional fact is concluded by the finding of neither court, but is the question left open for separate determination. For upon the determination of this fact depends the right of either probate court to take any step or make any valid order in relation to the

estate of deceased, whether it be the appointment of an administrator or the proof of a will.

It follows, the judgment will be reversed for further proceedings in conformity with this opinion.[4]

In re LOWHAM'S ESTATE. In re ECCLES' ESTATE. In re MURRAY'S ESTATE.

(Supreme Court of Utah, 1906. 30 Utah, 436, 85 Pac. 445.)

McCARTY, J.[5] * * * On March 30, 1905, William R. Lowham, a resident of the state of Wyoming, filed his petition in the district court of Weber county, Utah, praying that letters of administration of the estate of Joseph P. Lowham be issued to one A. I. Stone. The petition alleges in substance that on Nov. 12, 1905, at Evanston, Wyo., Joseph P. Lowham died intestate; that deceased left an estate in Weber county, Utah, consisting of a cause of action against the Union Pacific Railroad Company for injuries resulting in his death; that deceased at the time the injuries were received, and at the time of his death was a resident of Wyoming. Then follows the names and ages of the heirs at law of deceased. It further appears that at the time the petition was filed, the petitioner was the administrator of the deceased in the state of Wyoming. Letters of administration were duly

[4] The cases pro and contra are collected in 18 L. R. A. 242, note; 81 Am. St. Rep. 548–552, note. See, also, Balsewicz v. C., B. & Q. R. R., 240 Ill. 238, 88 N. E. 734 (1909).

"The rule in America is universal that administration may be granted in any state or territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased, and that probate of the will of any deceased person may be granted in any state where he leaves personal or real property. As between the several courts within the same state or sovereignty, jurisdiction attaches primarily to that tribunal which is invested with probate powers for the county or territorial district which includes the domicile of the testator or intestate at the time of his death, without regard to the place of his death or situs of his property. To grant letters on the estate of a deceased person the probate court must find as a fact, and thus judicially determine, that the deceased had his domicile in the county or territorial district over which the jurisdiction of the court extends (or, if a nonresident of the state, that he left property there), for otherwise the court would have no jurisdiction to grant letters, or take probate of a will. It was formerly held in many states that, notwithstanding this finding and adjudication by the court, proof might be made in a collateral proceeding showing that such finding and adjudication was erroneous, and that as a matter of fact the decedent was at the time of his death domiciled in a different county, and that in such case the grant of letters was void ab initio for the want of jurisdiction. But the more reasonable doctrine is gaining ground, and is now held in nearly all the states, that letters so granted, while they are voidable when properly assailed, are valid until revoked in a direct proceeding." 1 Woerner, American Law of Administration (2d Ed.) p. 439, § 204.

That the court first getting jurisdiction keeps it to the exclusion of all others, see In re Davis, 149 Cal. 485, 87 Pac. 17 (1906); Anderson v. Walter, 78 Kan. 781, 99 Pac. 270 (1908).

[5] Part of the opinion is omitted.

and regularly issued to A. I. Stone by the district court of Weber county, as prayed for in said petition.

It is admitted that the injuries which resulted in the death of the deceased were sustained by him in the state of Wyoming, and that letters of administration were obtained in the district court of Weber county, Utah, for the sole and only purpose of bringing suit in this state against the railroad companies mentioned, to recover damages for the death of decedent. * * *

Appellant's first contention is that the right created and given by the statute of Wyoming, to recover damages for the death of a person caused by the wrongful act of another in that state, is not such an asset of the estate of the deceased as will authorize the appointment of an administrator to bring suit to recover damages for death caused by such wrongful act.

Section 3448, Rev. St. Wyo. 1899, provides: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the wrongful act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amounts in law to murder in the first or second degree, or manslaughter."

Section 3449 of the same act provides that "every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law, in relation to the distribution of personal estates left by persons dying intestate * * * and the amount so recovered shall not be subject to any debts or liabilities of the deceased."

While a claim for damages for death by wrongful act is not a general asset of the estate under the foregoing provisions of the Wyoming statutes, we think it is a sufficient asset of the estate for the purpose of appointing an administrator. This court, in effect, so held in the case of In re Estate of Tasanen, 25 Utah, 396, 71 Pac. 984. The doctrine declared in that case is not only in harmony with the great weight of authority, but is, we think, supported by the better reason. Brown v. Railroad Co., 97 Ky. 228, 30 S. W. 639; Findlay v. Railroad Co., 106 Mich. 700, 64 N. W. 732; Hutchins v. Railroad Co., 44 Minn. 5, 46 N. W. 79; Merkle v. Bennington, 68 Mich. 133, 35 N. W. 846; Griswold v. Griswold, 111 Ala. 572, 20 South. 437; Railway Co. v. Reeves, 8 Ind. App. 667, 35 N. E. 199; Robertson v. Railroad Co., 122 Wis. 66, 99 N. W. 433, 66 L. R. A. 919, 106 Am. St. Rep. 925; Morris v. Railroad Co., 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; 11 A. & E. Ency. Law (2d Ed.) 828.

Having determined that a claim for damages for death by wrong-

ful act, under the statutes of Wyoming, is at least a special asset of the estate, the next question presented is, can the right thus given by the Wyoming statute be enforced in this jurisdiction through the medium of an administrator appointed by the courts of this state? This question was squarely presented and decided by this court in the case of Utah Sav. & Trust Co. v. Diamond Coal & Coke Co., 26 Utah, 299, 73 Pac. 524.

In view of the elaborate discussion of this branch of the case by appellant, in its brief, we have again given the subject careful consideration, and while there appears to be some conflict in the authorities on this question, the doctrine declared in the case of Utah Sav. & Trust Co. v. Diamond Coal & Coke Co., supra, is upheld by the decided weight of authority. Morris v. Chicago, R. I. & P. R. Co., 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; Stewart v. B. & O. R. Co., 168 U. S. 447, 18 Sup. Ct. 105, 42 L. Ed. 537; Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Boston & M. R. Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Louisville & N. R. R. v. Shivell's Adm'r (Ky.) 18 S. W. 944, 13 Ky. Law Rep. 902; Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121.

It being admitted that the proceedings leading up to the issuance of letters of administration to A. I. Stone were in accordance with the provisions of the statute regulating such proceedings, we are of the opinion, and so hold, that the district court of Weber county had jurisdiction to issue said letters, and that it did not err in dismissing appellant's petition to have them revoked. The judgment is affirmed, with costs.[6]

HADDOCK v. BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 155, 15 N. E. 495, 4 Am. St. Rep. 295.)

DEVENS, J.[7] The first question discussed by the appellant is whether the probate court has authority, as matter of law, to admit a will to probate 63 years after the death of the testator; and, incidentally, whether there is any limit of time after the death of the testator, subsequent to which the court has no such authority.

[6] On the right of action for negligent killing as an asset to give jurisdiction, see 1 L. R. A. (N. S.) 885, note; De Valle Da Costa v. Southern Pac. Co. (C. C.) 160 Fed. 216 (1908). For a general discussion of assets to give jurisdiction, see 24 L. R. A. 684, note.

That the objection to the granting of letters where the only asset is the right of action for negligent killing cannot be raised in the action for damages, see Reiter-Connolly Mfg. Co. v. Hamlin, 144 Ala. 192, 40 South. 280 (1906). But see Hoes v. N. Y., N. H. & H. R. R. Co., 173 N. Y. 435, 66 N. E. 119 (1903). Under the Minnesota statute the probate court has no jurisdiction to order a distribution of funds recovered in the action for wrongful death. Mayer v. Mayer, 106 Minn. 484, 119 N. W. 217 (1909). Compare Thompson & Lively v. Mann, 65 W. Va. 648, 64 S. E. 720, 22 L. R. A. (N. S.) 1094 (1909).

[7] The statement of facts and a part of the opinion are omitted.

In Shumway v. Holbrook, 1 Pick. 117, 11 Am. Dec. 153, the question was whether a will not admitted to probate was admissible in evidence. It was held that it was not; but it is said: "If a will can be found, it may be proved in the probate court at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after 20 years from his decease." In the course of the argument, Mr. Justice Jackson alluded to a case in Essex county, perhaps 30 years before, where it was found that a widow must hold land under a will which had not been proved. The will having been offered for probate, the judge of probate declined to allow it, as more than 20 years had elapsed since the death of the testator, and, on appeal, his decision was reversed, and the will admitted to probate. The research of the counsel for the appellant has established that the case thus alluded to was that of Dennis v. Bearse (Essex), and has supplied us with as satisfactory an account of it, drawn from the papers on file, as they will afford. It is a case to which some weight must be attached, as it brought into question, directly, the authority of the court of probate, and the appeal was to the full bench of the Supreme Court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction. The will thus admitted to probate was so admitted 36 or 37 years after its date. How long after the death of the testator does not clearly appear, although some of the papers found indicate that it was more than 30 years after.

In Marcy v. Marcy, 6 Metc. 360, the question was whether there was sufficient evidence that a will, which became operative 43 years before, had been admitted to probate, so that it could be read in evidence. The court held that there was such evidence; adding, "and on evidence like the present, it would be the duty of the probate court to establish the will, if, for want of form, the probate should have been considered so defective that the will had been rejected as evidence in its present state."

In Waters v. Stickney, 12 Allen, 1, 90 Am. Dec. 122, where it was held that the probate court, 14 years after admitting a will to probate, might admit to probate a codicil, written upon the same leaf, which had escaped attention, and was not passed upon at the time of the probate of the original will, it is said by Mr. Justice Gray, citing the above cases: "It has been directly adjudged by this court that a will may be proved even 30 years after the death of the testator, although original administration could not, by statute, be granted after 20 years;" and again, "If no will had been proved, the lapse of time would not prevent both will and codicil from being proved now."

While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after 60 years, yet

there is no suggestion in any of them that there is any limitation of time to such proof, and the language used is quite explicit to the contrary. In view of the decisions made, and the repeated expressions directly relevant to the cases considered, used in argument by judges of this court, we cannot treat this inquiry as the appellant desires we should—as practically a new question. We must deem it one that has been fairly passed upon and decided.

It may be that the inconveniences which might arise from the probate of a will many years after the death of the testator are such that a statute limiting the period might be properly enacted. That course has, in some states, been adopted. Rev. Conn. 1875, c. 11, §§ 21–23; Rev. St. Me. c. 64, § 1. But statutes of limitation are arbitrary, and the considerations which apply to positive laws of this character are legislative, rather than judicial. In many instances, where a great length of time has elapsed after the death of a testator, possessory titles will have been acquired which will prevail against the record. What is due to the just rights of the devisees is to be considered with reference to other rights of property, or to the repose of the community; but such considerations belong to the domain of legislation.

So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the probate court by its regular course of procedure. * * *

Cause to stand for further proceedings.[8]

[8] July 18, 1877, a petition for probate of the will of one who died about March 19, 1663, was filed in New York. The application was denied, on the ground, among others, that it would be presumed that due administration was had, though no record of it could be found. Van Giessen v. Bridgford, 83 N. Y. 348 (1881). A limitation period for granting probate or administration is fixed in some states. See 46 Am. Dec. 439, note. That under such a statute a codicil such as existed in Waters v. Stickney, cited in the principal case, cannot be admitted to probate with the will after the expiration of the statutory period, see Estate of Elizabeth Adsit, Myr. Prob. (Cal.) 266 (1879). But it is uncertain what effect such a statute would have on a situation like that in Ffinch v. Combe, [1894] P. 191, where 20 years after a will was admitted to probate, with blank spaces where obliterations had been made, it was shown to be possible to read the words under the obliterations, and in consequence the words were admitted to probate. In the absence of a statute to the contrary, the prior probate of an earlier will does not preclude the probate of a later will, when it is discovered. Cousens v. Advent Church, 93 Me. 292, 45 Atl. 43 (1899).

SECTION 2.—THE NECESSITY AND EFFECT OF PROBATE AND OF ADMINISTRATION*

RICHARDS v. PIERCE.

(Supreme Court of Michigan, 1880. 44 Mich. 444, 7 N. W. 54.)

CAMPBELL, J. Plaintiff brought ejectment for certain lands in Shiawassee county, which belonged to James Wadsworth, of Livingston county, New York, and were devised by his last will to various persons, from whom plaintiff derives title. These devises were partly in trust and partly directly, in the same proportions and for the same beneficiaries as would have taken the property by descent. The testator died in 1844 and his will was proved the same year in New York, but was not proved in Michigan until after this action was brought.

The only question argued before us was whether, before probate, ejectment could be brought by devisees or by those to whom their rights had been previously transferred. The general direction given by the court below to find a verdict for the defendant must have been

*EFFECT OF PROBATE IN COMMON FORM AND IN SOLEMN FORM—STATUTORY METHODS OF PROBATE AND OF CONTEST.—"In the English ecclesiastical courts, which had exclusive jurisdiction of wills so far as they operated upon personal property, but no jurisdiction in respect of devises of real estate, there were two modes of obtaining probate, one in common form and the other in solemn form, or per testes. The probate was said to be in common form when the executor presented the will for probate in the absence of the parties, and, without citing them, proceeded ex parte with his proof; and it was said to be in solemn form when those in interest were cited to be present, and full proof was made by the examination of witnesses. When a will was proved in common form, the court might at any time within 30 years after probate, of its own motion or at the instance of the next of kin or other person interested, require the executor to prove the will in solemn form.

"In the United States there is a general similarity of practice in administering the various statutory methods of probate and contest, but a considerable diversity in their technical features. In some of the states, the proceeding in the probate court upon the original application for probate is entirely ex parte; but some proof of the will other than the oath of the executor, which was sufficient for the English probate in common form, is always required. In others, a notice and an opportunity for a contest are given, formal, or informal, in the probate court. If the will is allowed or rejected without a contest, or after a contest not tried by jury, an appeal may usually be taken to an intermediate appellate court having a jury, where the case is tried de novo, and this remedy is sometimes exclusive. In others, after a decree of the probate court allowing the will, a retrial may be had upon petition to that court to revoke the probate, or an action at law or a suit in chancery to contest the validity of the probated will may be brought in another court within the county. These methods of contest by appeal, by petition to revoke the probate, or by original action, correspond in purpose and effect to the probate in solemn form of the English ecclesiastical courts.

"In a great majority of the United States the probate court has exclusive jurisdiction to admit to probate wills containing devises of real estate, and such wills are probated and contested in the same manner as wills of personalty alone." 16 Ency. of Pl. and Pr. 993–996.

given under misapprehension, as title was made out which would have been valid without a will, to a large share of the estate. But this seems to have escaped the notice of all parties, and is not material as the case stands.

There has never been any question of the right of a devisee to take his estate as of the death of the testator, and our statutes confine descents, and did when this testator died, to property which is not devised. Rev. St. 1838, p. 267. That this is so for all purposes except as otherwise provided by statute is not doubted. But it is claimed that the declaration of section 30, p. 275, Rev. St. 1838 (which is substantially the same as in subsequent revisions), that "no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court," makes every devise take effect from probate and not earlier, and if not for other purposes, does so for purposes of bringing action. As probate was always necessary to enable one to make proof of title of personalty, this statute cannot certainly impose any greater restrictions on realty than existed before on personalty.

There were undoubtedly some technical rules of common-law pleading which required an executor to make profert of his letters in pleading. But for any other purpose the decisions are uniform that probate merely furnished the means of establishing by a peculiar kind of record evidence the validity of an existing right; and that for every valuable purpose touching the existence and transfer of title the probate was retroactive, and had the same effect as if it had been had at the time of the testator's death. And so far as the statutes have been applied to devises, there is no material difference. Upon so familiar a rule it would not be profitable to multiply authorities, and a few illustrations will suffice as to the condition of things before probate.

The executor may release a cause of action. Co. Lit. 292b. He may sell goods. Mayor of Norwich v. Johnson, 3 Mod. 92. He may enter on a term and the entry be good though he die before probate. 3 Dyer, 367. He may sell a term of years, though he die before probate, and the sale will stand. Brazier v. Hudson, 8 Simons, 67.

In Wankford v. Wankford, 1 Salk. 299 and notes, the doctrine is quite fully discussed, and clearly laid down. And the practical result is said in Brazier v. Hudson to be that subsequent probate validates all acts that would be valid after. This may be a somewhat broad statement, but it is certainly true for most purposes, and authorities might be multiplied upon it.

In the United States the rule has been the same. After probate a conveyance previous thereto by a devisee has been held valid. Spring v. Parkman, 3 Fairf. 127. And in De Wolf v. Brown, 15 Pick. 462, it was held the estate devised vested immediately both as to realty and personalty on the death of testator, so as to authorize suit for a taking of property connected with a farm before probate. The action then was after probate. Both these cases were under statutes like ours.

We have ourselves passed upon the question as to the immediate interest of a legatee in a mortgage which formed part of an estate in realty and personalty willed to her. In Sutphen v. Ellis, 35 Mich. 446, we held that an assignment of the mortgage made by the legatee who died before the will was proved, was valid. As already suggested, our statute puts realty and personalty on the same footing as to the necessity of probate.[9]

In 3 Redfield on Wills, 23, a similar doctrine is laid down, but it is suggested there as well as in some other authorities that no action will lie before probate, and this seems to be asserted on an idea that in law no action accrues any earlier. We think this is a misapprehension. The common-law authorities upon pleading require profert to be made in the declaration, and for this reason it is often said probate must then have been taken out. But we do not find any doctrine requiring probate before action brought, but only before declaring. In 1 Salk. 302, 303, before referred to, it is said that an action may be brought before probate, but plaintiff cannot declare. Several authorities are collected in Comyn's Dig. "Administration," B, 9, to the effect that an action brought before probate is made good by subsequent probate, "for it is sufficient if the probate appears upon the declaration."

In Thompson v. Reynolds, 7 B. & C. 123, the true doctrine was more distinctly explained. In that case upon an issue made by plea and replication whether the plaintiff was executor in manner and form as averred in his declaration, in which he actually made profert of his letters, he was allowed to recover, although the proof showed the letters were not granted until some months after the declaration was filed. In equity also it has been held that proof of probate before the hearing

[9] "The probate court has decided that the will was such as was entitled to probate. That decision is final at this time, and cannot be the subject of collateral attack. In England the probate of wills bequeathing personal estate belongs to the ecclesiastical court, and no probate of a will devising real estate is necessary; the real estate there passing immediately to the heirs at law upon the death of the owner. Under the law of England an action of ejectment would lie by a person claiming to be owner of real estate under a will, against the heirs at law who have taken possession of the real estate so devised by will; but that was because there had been no adjudication by the court as to the status of the property. But in regard to the personal estate, under the English law, the ecclesiastical courts having jurisdiction of the probate of wills regarding such property, when a will was admitted to probate and established, then such decree was final, and could not be attacked collaterally. Under the laws of most of the states of the Union, the probate courts have been given jurisdiction of both real and personal property of a decedent; and the decisions are uniformly to the effect that, where such jurisdiction is given to probate courts, their decrees establishing a will of realty are as conclusive as the decrees of the ecclesiastical courts of England in regard to personal property." Beauchamp, J., in Ward v. Board of Com'rs, 12 Okl. 274, 70 Pac. 381 (1902).

In New York probate is not conclusive as to realty. Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628 (1896); Smith v. Ryan, 116 App. Div. 397, 101 N. Y. Supp. 1011 (1906).

is sufficient, although occurring during the litigation. Humphreys v. Humphreys, 3 P. Wms. 349. And see Comber's Case, 1 P. Wms. 768.

It appears that the only objection that has been urged does not really go to the right of action, but only to the formalities of pleading; and that this forms no exception to the rule that the probate relates back. As under our forms of pleading the plaintiff in ejectment is not bound to aver the character of his title except as to its extent, there is no room for the formal objection, which has never even in personal actions been allowed to prevail if the party chose to make proper allegations, whether true or false.

We think the plaintiff had a right to bring his suit. The judgment must be reversed with costs and a new trial granted.[10]

Appeal of WILLETTS.

(Supreme Court of Errors of Connecticut, 1882. 50 Conn. 330.)

Appeal from a decree denying the probate of a will. The following facts were found by the court:

Alice Fowler died at Greenwich, in this state, February 7, 1875. Soon after her death, the court of probate for the district of Greenwich granted administration upon her estate to one William C. Field, and in the decree found that she had her domicile within that district at the time of her death, that she had died intestate therein, and that at the time of her death she had goods and estate whereof administration appertained to that court. This decree was passed on the 8th of March, 1875.

Alice Fowler at the time of her death left an instrument purporting to be a last will and testament, executed December 6, 1874, in Greenwich, and attested by two witnesses only, in accordance with the laws of the state of New York.[11]

[10] "In this case the will under which the appellee claimed title was not probated until seven years after the death of Mary Rodrigues, the testatrix. Nevertheless the interest devised by the will to the appellee took effect immediately upon the death of the testatrix. This principle is clearly settled by the case of Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13 (1879)." Dowdell, C. J., in Touart v. Rickert (Ala.) 50 South. 896, 897 (1909).

[11] The Connecticut statute on the execution of wills applicable appears to have been the following: "No will or codicil shall be valid to pass any estate unless it be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other; but no will of personal estate made before the 27th day of June, 1848, shall be invalid if not so attested; and all wills executed according to the laws of the state or country where they are executed may be admitted to probate in this state and shall be effectual to pass any estate of the testator situated in this state." Gen. St. 1875, p. 369, § 2. In 1885 the requirement that the witnesses subscribe in the presence of each other was omitted. Laws 1885, p. 500, § 131; Gen. St. 1902, § 293.

Later the courts of New York, on motion of the executors named in the will, and upon due notice and citation to all parties concerned, found that Alice Fowler, at the time of her death, was domiciled in New York, and admitted the will to probate. The executors demanded the estate property from John G. Reynolds, who had succeeded Field as administrator, but he refused to deliver it to them.

This application for probate was then made in the probate court for the district of Greenwich, it being based upon the probate in New York.

PARDEE, J.[12] It is urged by the appellees that the will in question is not valid in the state of New York because it was executed in this state; that, the probate court in this state having first decided the question as to the domicil of the testatrix at her death, it was not in the power of the court in New York to make a contrary decision which would be binding on the probate court; and that our statute (Gen. St. p. 369, § 2), providing that "all wills executed according to the laws of the state or country where they were executed may be admitted to probate in this state and shall be effectual to pass any estate of the testator situated in this state," excludes this will.

Presumably the probate court for the district of Greenwich granted letters of administration upon the estate of Alice Fowler without notice to any person in interest, at the request perhaps of an heir, perhaps of a creditor, upon the representation that she died intestate, a resident, and leaving estate in that district; and while in the absence of the probate there of her will this grant would protect the administrator in taking possession of the estate in that district for the protection of creditors there and ultimately of legatees and heirs, yet it does not bar the executors named in a will subsequently found from proving in legal manner and before the proper tribunal in the state of New York that she died resident there, leaving a will valid according to the laws of that state for the purpose of passing title to both real and personal property; nor does it bar them, having duly proved the will in the state of residence at death, from the right to be intrusted by the court of probate in Greenwich with ancillary administration.

It is not a matter of legal necessity that a grant of letters of administration should control the disposition of an estate to final distribution. Such grant must yield to the superior force of proof made, either that the supposed decedent is living, or that he left a valid will subsequently found, or that he died resident in a district other than that assuming jurisdiction.

The judgment in New York is that of a court of record, of general jurisdiction, proceeding according to the common law; in other words, of a court having full power to investigate and decide facts and called upon in due course of law so to do. All parties to the proceeding

[12] The statement of facts is abbreviated.

before us were either voluntarily or upon proper compulsion within the jurisdiction of and before that court.

The judgment there rendered was the first in order of time to conclude them upon the question as to the place of residence of the testatrix at the time of her death. Since its rendition none of them have had the right to deny in any court the fact as there established. They cannot now reopen the issue there made and determined against them. And the fact that upon and because of this determination of the question of domicile the will was admitted to probate in the state of New York, conclusively establishes, so far as the parties to that proceeding are concerned, in all courts, that it is the will of a person there resident at death[13] and that it is there valid both as to real and personal

[13] But in Dallinger v. Richardson, 176 Mass. 77, 82, 57 N. E. 224, 225 (1900), where the question was whether, in an action to collect taxes, a finding that the deceased was a resident of Washington, D. C., could be upheld, since a Massachusetts probate court, in admitting the will of deceased to probate, had described him as a resident of Massachusetts, Hammond, J., for the court, said: "The adjudication of the probate court as to residence is conclusive so far as respects its own jurisdiction, but no further. It cannot be held to shut off all inquiry into the question of residence when that question is being investigated by another tribunal, in a matter not involving the validity of any order or decree of that court, or some proceeding thereunder." See, also, Concha v. Concha, L. R. 11 App. Cas. 541 (1886). A similar doctrine has been laid down as to the adjudication as to testator's mental capacity. Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265 (1886). Moreover, the full faith and credit clause of the federal Constitution does not give the probate adjudications of one state any greater effect in a sister state. See Tilt v. Kelsey, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. Ed. 95, 79 N. W. 39 (1907) where it is held that the full faith and credit due the probate proceedings in one state do not require that the courts of another state shall be bound by the adjudication of the former as to the domicile of the deceased. See, also, Thormann v. Frame, 176 U. S. 350, 20 Sup. Ct. 446, 44 L. Ed. 500 (1900), affirming Frame v. Thormann, 102 Wis. 653 (1899), and Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741 (1900). The probate court has power to bind all the world as to the res before it, namely, the property of the deceased within the state, but has no power to bind the world or the parties to the proceeding as to other property, or as to the matter of domicile where that comes up in a proceeding in the same or another state in a way not affecting the disposition by the court of probate of the res it had, though it has been held that one state may recognize the probate decrees of another state as conclusive.

It is well settled that the full faith and credit clause does not compel one state to recognize, so far, at least, as real property within its own limits is concerned, the binding force of probate adjudications in another state. As was said by the Supreme Court of Georgia recently: "Prior to 1878, and while there was no statutory provision for the probate of a foreign will, it was held by this court that an exemplified copy of a will probated in another state was a good muniment of title to real estate in Georgia, although the will was neither probated nor recorded in this state. Doe ex dem. Dooley v. Roe and MacCurley, 31 Ga. 593. Counsel for defendants in error ask leave to review this case on this point. We think the ruling is opposed to the almost, if not quite, universal holdings in other jurisdictions. It seems to us that to give conclusive effect to a foreign will disposing of land in this state would be to allow courts of other states to establish the validity of a will disposing of land in Georgia. The learned judge who delivered the opinion of the court predicated this ruling upon the act of Congress which requires full faith and credit to be given in each state to the records and judicial proceedings of all other states. But this provision of

estate. This being so, the executors have the right to prove it in this state for the purposes of ancillary administration.

The superior court is advised to reverse the decree of the probate court of Greenwich.*

PLUME v. BEALE.

(High Court of Chancery, 1717. 1 P. Wms. 388.)

A bill was brought by the executor of Doctor Plume, to be relieved against a legacy of £100, claimed by the defendant Beale, as given by the will of Doctor Plume.

the federal Constitution and the act of Congress applies only to the records and proceedings of courts so far as they have jurisdiction, and is not to be construed so as to give a foreign judgment extraterritorial effect in disposing of land in another state. Lindley v. O'Reilly, supra (50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802), and cases cited. We think that the [Georgia] act of 1894, providing for the probate of a foreign will in this state, impliedly repeals the ruling announced in the Dooley Case in 31 Ga. 593; but, as we deem the ruling there made to be unsound, we formally overrule so much of that case as decides that an exemplification of a probate of a foreign will is admissible in evidence as a muniment of title to real estate in this state, although the will was neither probated nor recorded in this state." Atkinson, J., in Chidsey v. Brookes, 130 Ga. 218, 221, 60 S. E. 529, 530 (1908). See Robertson v. Pickrell, 109 U. S. 608 3 Sup. Ct. 407, 27 L. Ed. 1049 (1883); Solis v. Williams (Mass.) 91 N. E. 148 (1910). On the extraterritorial effect of decrees as to realty, compare Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. —, 23 L. R. A. (N. S.) 924 (1909).

Even though probate in the state of the testator's domicile is deemed conclusive everywhere as to personalty—Brock v. Frank, 51 Ala. 85 (1874) and cases cited in 9 Am. & Eng. Ann. Cas. 422, note—because of a fiction that, no matter what the actual situs of the personalty is, its legal situs is at the domicile, the question of what is the state of the domicile must always be open in a state where it has not been litigated, unless a valid state statute forecloses the question. The soundness of the decision in Appeal of Willetts, supra, would therefore seem to depend upon the Connecticut statute quoted in note 11, ante. It has been held that a state may by statute make probate in another state conclusive both as to personalty found in the enacting state —Martin v. Stovall, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130 (1899)—and as to realty situated there. Crippen v. Dexter, 13 Gray (Mass.) 330 (1859); Babcock v. Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503 (1895); State v. District Court, 34 Mont. 96, 85 Pac. 866, 6 L. R. A. (N. S.) 617, 115 Am. St. Rep. 510 (1906). See, also, Stull v. Veatch 236 Ill. 207, 86 N. E. 227 (1908). But even if such statutes are not unconstitutional, it is difficult to see how the statute quoted in note 11, ante, made the New York probate of the will executed in Connecticut and not valid according to the laws of Connecticut conclusive in that latter state as to the domicile of the testatrix or as to anything else.

On the conclusiveness in a domestic court of a foreign will duly probated abroad, see 48 L. R. A. 130, note; 6 L. R. A. (N. S.) 617, note; 9 Am. & Eng. Ann. Cas. 422, note; 14 Am. & Eng. Ann. Cas. 977, note; 113 Am. St. Rep. 214, note. On conflict of laws as to wills, see 2 L. R. A. (N. S.) 408, note.

* In In re Clark's Estate, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197 (1905), it was held that under the California statute the will of a resident of California, proved originally in another state, could not thereafter be proved in California as a foreign will. Full probate was required in California. The cases are collected in 1 L. R. A. (N. S.) 996, note; 7 Am. & Eng. Ann. Cas. 313, note; 113 Am. St. Rep. 211, note.

The defendant Beale was no relation to the doctor, nor had done him any service, saving that now and then she had, during his illness, brought him some few slight cordials, in return for which, the doctor had ordered her a piece of plate.

This £100 legacy was interlined in the will by a different hand, and supposed to have been done by the defendant herself, when she was left in the room alone with the corpse, in which room the will was left.

But forasmuch as the will was proved by the plaintiff the executor in a proper court, that had a proper jurisdiction, (it relating only to a personal estate,) and more especially, for that the executor might have proved the will in the spiritual court, with a particular reservation as to this legacy, THE COURT [Lord Chancellor COWPER] said his remedy must be there, and dismissed the bill with costs.[14]

CHAMPOLLION v. CORBIN et al.

(Supreme Court of New Hampshire. Sullivan, 1901. 71 N. H. 78, 51 Atl. 674.)

CHASE, J.[15] The subject-matter of this suit is 10 shares of the capital stock of the Blue Mountain Forest Association, a corporation organized under the general laws of the state. Although the property of the corporation consists largely of real estate, these shares are choses in action, or property in the nature of choses in action—not

[14] "As to the first point, it is undoubtedly the general rule both in England and this country that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. * * * And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief. In England, after the acts of Parliament had authorized devises of real estate, the same position was assumed by courts of equity in regard to such devises; it being held that any fraud, illegality, or mistake affecting their validity could be fully investigated and redressed in the courts of common law, where only devises were cognizable. An occasional exception, or apparent exception, to this noninterference of courts of equity with wills and devises is found in the books; but these occasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force. * * * It has also been held that where a person obtains a legacy by inserting his own name in the will, instead of that of the intended legatee, he may be declared a trustee for the latter. Marriott v. Marriott, 1 Strange, 666. In such a case the court of probate could not furnish a remedy, since to strike the bequest out of the will, or to refuse probate of it, would defeat the legacy altogether; and that court is incompetent to declare a trust. The English authorities are fully discussed by Lord Lyndhurst in Allen v. McPherson, 1 Phillips, 133, and by him and Lords Cottenham, Brougham, Langdale, and Campbell, in the same case on appeal in the House of Lords. 1 H. L. C. 191." Bradley, J., in Case of Broderick's Will, 21 Wall. 503, 509–511, 22 L. Ed. 599 (1874).

On whether an intended legatee, who fails to take because a third person fraudulently procured the will or codicil to be defectively executed, may hold the fraudulent person liable in a tort action, see Lewis v. Corbin, 195 Mass. 520, 81 N. E. 248, 122 Am. St. Rep. 261 (1907).

[15] The statement of facts and part of the opinion are omitted.

realty. 1 Mor. Corp. §§ 224, 225; 1 Cook, Corp. § 12; 1 Thomp. Corp. §§ 1066, 1070; 3 Thomp. Corp. § 3317.

The plaintiff's alleged title to the shares depends solely upon the fact that he is the only child of the late Mary C. Champollion, who, he alleges, was the owner of them at the time of her decease. He does not claim that any decree has been made in the course of an administration of her estate by virtue of which he acquired a title, but, in effect, says that the law, operating upon the fact that he is her only child, transferred her title to him, ex proprio vigore. He does not direct attention to any particular statutory provision which operates in this manner, but seems to rely upon the common law.

According to the common law, personalty did not, like realty, descend immediately to the heir upon the decease of the owner, but passed to the personal representative, to be used primarily for the payment of debts and other charges against the estate. Anciently, if there was any surplus, the administrator held it to his own use. The first statute of distribution was 22 & 23 Car. II, c. 10, enacted in 1670. By it, the administrator was required to give a bond, with two or more sureties, to return an inventory; to administer the goods, chattels, and credits of the deceased according to law; to render a true and just account of his administration at or before a date specified; and to deliver all the rest and residue of the goods, chattels, and credits which should be found remaining upon settlement of his accounts unto such persons as the judge should by decree, pursuant to the statute, limit and appoint. Archbishop of Canterbury v. Tappen, 8 Barn. & C. 151. It provided that one third part of the rest and residue, or "surplusage," was to go to the widow, if any, and the residue in equal shares to the children or their representatives, making due allowance for advancements; or, if there were no children or representatives of childen, one-half was to go to the widow, and the residue equally to the next of kindred in equal degree and their representatives. If there was no widow, the whole was to be distributed to the children or next of kindred, as the case might be. 2 Kent, Comm. 420.

The statutes of distribution of the several states are based upon this statute, and in a majority of the states the distribution is to the same persons, in the same proportions, and subject to the same regulations in substance. Schouler Ex'rs, § 495; 2 Kent, Comm. 426. The provisions of the statute of this state are very nearly the same as those of the English statute. Pub. St. c. 188, § 12; Id. c. 195, § 10; Id. c. 196, §§ 1, 6.

If Mrs. Champollion's domicile was in this state at the time of her decease, the plaintiff has failed to allege or prove that he has acquired a title to the stock in question under the statutes of the state. Until a decree of distribution, "neither the widow nor the next of kin has any title to the personal estate, and, of course, can maintain no action to recover it." Weeks v. Jewett, 45 N. H. 540, 542; Bartlett v. Hill, 69 N. H. 197, 45 Atl. 144. If her domicile was elsewhere, as the

plaintiff's allegations and the defendants' admissions tend to show, administration upon her estate here, if any there were, would be merely ancillary, and the plaintiff's right to any balance of property in the administrator's hands would depend upon the laws of her domicile. Goodall v. Marshall, 11 N. H. 88, 35 Am. Dec. 472; Leach v. Pillsbury, 15 N. H. 137; Stark v. Parker, 56 N. H. 481; Leonard v. Putnam, 51 N. H. 247, 12 Am. Rep. 106. If the court were at liberty to search for and ascertain those laws, they are prevented from doing so by the failure of the plaintiff to furnish definite information of the facts upon which domicile depends. In either contingency, the plaintiff does not show that he is entitled to maintain the suit.

It should also be borne in mind that it is only the "surplusage," or the portion of the personal estate "remaining in the hands of the administrator on settlement of his administration account," that is subject to distribution under the statutes of distribution; and, for anything that appears in the case, the stock in question, if it belonged to Mrs. Champollion, may be required to pay debts or charges against her estate.

It appears that other parties are interested in the questions as to which the defendants in their answers pray for direction. Mrs. Borrowe, a child of Mr. Corbin, and presumably interested in his estate, denies that Mrs. Champollion had any title or right to the stock in question. She further claims that the Corbin stock in the corporation should be sold without regard to the restraining provisions of the by-laws on the subject. The corporation itself, and all the other stockholders, are interested in the latter question. If the court of this state is authorized to comply with the defendants' prayer—a point that has not been considered—it would not undertake to do so until these parties were given an opportunity to be heard upon the questions. * * *

Case discharged. All concurred.[16]

[16] On the right of the sole distributee to sue for personalty, where there has been no administration, see 112 Am. St. Rep. 731, note; 23 Am. Dec. 200, note. Pending the appointment of an administrator, next of kin have been allowed injunctions and receivers to protect the personalty from misappropriation by strangers. Buchanan v. Buchanan, 73 N. J. Eq. 544, 68 Atl. 780 (1908).

Where by statute administration cannot be granted after a certain period of time, the title to personal property vests in the distributees at the expiration of that period without administration, and they may recover the property by action. Phinney v. Warren, 52 Iowa, 332, 1 N. W. 522, 3 N. W. 157 (1879); In re Acken's Estate (Iowa) 123 N. W. 187 (1909). Compare State v. Superior Court, 48 Wash. 141, 92 Pac. 942 (1907). See, also, Duvall v. Healy Lumber Co. (Wash.) 107 Pac. 357 (1910), where there was a similar statute as to real estate.

"The goods of an intestate used to belong to the ordinary until administration was granted. After the probate court was established, they passed to the judge of that court. They now, I take it, pass either to all the judges of the Supreme Court or to the judges of the Probate Division. The question can hardly arise unless some one during the interval steals the goods. In such a case it would be necessary in the indictment to specify the person whose goods he stole; and I take it that, to use the technical

BROWN v. BAXTER et al.

(Supreme Court of Kansas, 1908. 77 Kan. 97, 94 Pac. 155.)

GRAVES, J.[17] Three assignments of error have been made: (1) The plaintiff is not the owner of the note and mortgage or the real party in interest. (2) The cause of action is barred by the statute of limitations. (3) The court erred in the admission of evidence. * * *

It is insisted that, when a citizen of the state of Ohio dies, the title to his personal property descends to his executor or administrator, and not to his heirs, and therefore the ownership of the note and mortgage involved in this action did not pass to M. J. Buchanan, or to the plaintiff, but they have at all times belonged to the estate of John Buchanan, deceased. Assuming, as we must in the absence of evidence to the contrary, that the law of the state of Ohio upon this subject is the same as it is in this state, we do not concur in this view.

Under sections 1–32 of the law relating to descents and distributions, being chapter 33, Gen. St. 1901, the equitable title to the whole estate belonging to a decedent, real and personal, not exempt, descends directly to his heirs. The legal title to personal property passes to the administrator, if there be one, who holds it in trust for creditors, heirs, or legatees. Fletcher v. Wormington, 24 Kan. 264. When there are no debts, administration is unnecessary, and the heirs may collect the estate and make distribution among themselves. See 3 Redfield on Wills, p. 89; 17 Am. & Eng. Ency. of Law (2d Ed.) 742, where it is said: "If there are no creditors, the next of kin entitled to the estate may collect and make distribution among themselves without administration, but the court of probate still has jurisdiction to grant adminstration, though the estate owes no debts, and there is only one distributee." See, also, 18 Cyc. 62, where it is said: "In a number of states it is held that administration is unnecessary where there are no debts of the estate or the debts have all been paid; the courts considering that when the only duty devolving on an administrator would be to make a distribution of the estate, and the heirs or distributees make or are able to make a satisfactory distribution or disposition thereof themselves, or there is only one heir, administration would be merely a useless ceremony involving unnecessary expense, and the same is true where no administration has been applied for, and the claims of creditors, if any exist, are barred because they have not been presented to the probate court within the time limited for that purpose, or by the statute of limitations. But, if any of the heirs or distributees demand an administration, it must be had."

phrase, the property would be laid in the judges of the Probate Division or possibly in the President of that Division." Maitland's Equity and the Forms of Action at Common Law, 88, 89, and note.

[17] The statement of facts and part of the opinion are omitted.

In the case of Foote v. Foote, 61 Mich. 181, 28 N. W. 90, the court said: "The legal estate only in personal property vests in the administrators. The equitable estate therein is in the heirs, or other persons entitled to distributive portions thereof. The estate of the administrators therein is a trust for that purpose, and is created only for the purpose of laying hold of the estate and making such distribution. When there are no creditors, the heirs or legatees may collect, if they can, the estate together, and make such distribution among themselves as they may agree to and carry into effect, without the intervention of any administrators; and the law favors such arrangements. In such cases it is only where the heirs or legatees fail to make such collection and distribution that administration becomes necessary. When such arrangement and distribution have been made and executed, it will be binding, both in law and equity, as between the parties making it, whenever the rights of creditors do not intervene. And, where there are no creditors, the heirs or legatees may divide up and distribute the personal property of the decedent, without converting it into money, in such manner as they see fit; and, when such division has been executed, even though it is not such as the decedent has made by his will, or such as the law would make when there is no will, it will be binding upon all the parties to the agreement."

In the case of Walworth v. Abel, 52 Pa. 372, it is said: "No doubt the personal estate of a decedent vests in the administrator; but in trust for creditors and heirs or legatees. The mere legal estate passes to the administrator. The equitable descends upon the parties entitled to distribution. If there be no creditors, the heirs have a complete equity in the property, and, if they choose, instead of taking letters of administration, to distribute it by arrangement made and executed amongst themselves, where is the principle which forbids it? The parties to such an arrangement executed would be forever equitably estopped from disturbing it, as amongst themselves, upon the most familiar principles of justice. And why shall the arrangement be broken up by a mere intermeddler? Family arrangements are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or any other for them."

The following cases are to the same effect: Needham's Adm'r v. Gillett's Adm'r, 39 Mich. 574; Waterhouse v. Churchill, 30 Colo. 415, 70 Pac. 678; McGhee v. Alexander, 104 Ala. 116, 16 South. 148; Cox v. Yeazel, 49 Neb. 343, 68 N. W. 485.

In this case there were no debts, except a few of small amount, which were paid. The assets were accessible to the heirs of the intestate, who lived where they could easily confer with each other. The appointment of an administrator was unnecessary, and the expenses incident thereto might well be avoided. The property belonged to the heirs exclusively, and it seems reasonable and just that they should have the right to divide it among themselves, and own, use, and dispose of it in severalty as any other property which they

might own. The only person who could question such a transaction would be a creditor who had been overlooked and not paid. The possibility of that contingency had passed, however, some years before this action was commenced by lapse of time; more than three years having passed since the last date at which an administrator might have been appointed. Bauserman v. Charlott, 46 Kan. 480, 26 Pac. 1051; Kulp v. Kulp, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; Bank v. King, 60 Kan. 737, 57 Pac. 952.

The widow and each of the children of John Buchanan, deceased, testified at the trial to the settlement and division of the estate among themselves and the grandchildren of the deceased, and that it was satisfactory to all parties. The great lapse of time since the estate was settled, during which all parties have acquiesced therein and retained the amount received thereby is sufficient to estop them from hereafter objecting to the arrangement. The claim of the plaintiff in error that the note and mortgage are barred by the statute of limitations is placed upon the ground that Mary J. Buchanan did not become the owner thereof by the action of the heirs of John Buchanan, deceased, and therefore the payment of interest to her did not prevent the running of the statute. The view we have taken of her rights in this respect, however, answers this objection, and the question need not be further considered.

This disposes of the assignments of error. No material error having been shown, the judgment is affirmed.[18]

[18] See Carter v. Owens, 41 Ala. 217 (1867), where the deceased left a will. See, also, Granger v. Harriman, 89 Minn. 303, 94 N. W. 869 (1903). But see Davenport v. Brooks, 92 Ala. 627, 9 South. 153 (1890). In 22 L. R. A. (N. S.) 454, note, the cases pro and contra on the right of the next of kin to maintain an action in the interest of the estate under the circumstances shown in Brown v. Baxter, supra, are collected.

"There is a series of decisions in this court asserting that, when an estate is left entirely free from debt, the distributees may in equity obtain distribution without the delay and expense of administration. * * * The rule to be extracted from these decisions is that a court of equity will dispense with an administration, and decree distribution directly, when it affirmatively appears that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as 'a useless ceremony.'" Brickell, C. J., in Fretwell v. McLenore, 52 Ala. 124, 131, 133 (1875). See Wood v. Ford, 29 Miss. 57 (1855). So, where there is collusion between the administrator and the person sued, making such action necessary, the next of kin may be allowed to sue, joining the administrator as a defendant. Doran v. Simpson, 4 Yes. Jr. 651 (1799); Trotter v. Mutual Reserve Fund Life Ass'n, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887 (1897); Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679, 114 Am. St. Rep. 185 (1906).

On the necessity of administration and the effect of agreements dispensing therewith, see 15 L. R. A. 490, note; 112 Am. St. Rep. 729, note. In Ormsbee v. Piper, 123 Mich. 265, 82 N. W. 36 (1900), it was held that an administrator, duly appointed without appeal, could not be denied the uncollected choses in action belonging to the estate just because, there being no debts, the next of kin had agreed that there should be no administration of the estate.

"Ordinarily the entire title to personal property left by an intestate vests in the administrator of his estate. * * * What is the condition under which an exception to this general rule should be permitted? Obviously it

DUDLEY v. GATES.

(Supreme Court of Michigan, 1901. 124 Mich. 446, 86 N. W. 959.)

MONTGOMERY, C. J.[19] This case was decided at the June term, 1900, and is reported in 124 Mich. 440, 83 N. W. 97. A rehearing has been granted, and we have been favored with full briefs and able arguments by counsel.

It is strenuously insisted that the court was in error in determining that on the probate of a will it is not the duty of the court to construe the terms of the will. Upon full consideration, we are thoroughly convinced that the former opinion correctly states the general rule. In Woerner, Adm'n, § 222, p. *485, it is said: "A court of probate determines only whether the instrument propounded has been executed by the testator and attested by the witnesses in the manner prescribed by the statute, and that he possesses a sufficient testamentary capacity; in other words, whether the instrument is the testator's spontaneous act, expressing his last will in the form recognized by law. Its approval of the will relates only to the form. Void bequests are not validated thereby, nor should the probate distinguish between valid and void,

should embrace these three elemental facts: First, the absence of debts against the estate; second, the legal age of each of the heirs entitled to share in its distribution; and, third, a unanimity among them as expressed by their agreement or acts to dispense with an administration. In the absence of these three elements, it cannot be said the title vested in the administrator is a mere naked trust. If creditors exist, they have the right to an administration of the estate in the manner provided by law. If any of the heirs is of nonage, he cannot consent to a 'domestic distribution,' and his right to the protection of an administration cannot be contracted away by the others in interest. And, lastly, it may be stated as a self-evident proposition that no heir against his will can be deprived of the benefit of administration. He may fear the possibility that in course of time some one may come forward with a fictitious demand against the estate, relying for success on the fact that the evidence by which it could have been refuted has perished, or he may prefer not to attempt to make an agreement with the other heirs for a division of the estate, but to let the law take its course. He cannot be coerced into an agreement, nor be deprived of the protection of an administration, except by consent." Johnson, J., in Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769 (1907).

In Koslowski v. Neuman, 74 Neb. 704, 105 N. W. 295, 3 L. R. A. (N. S.) 704 (1905), an agreement by an intestate to let all his property at his death "descend to and belong to" one K., who was not an heir or one of the next of kin, was held to entitle K., as equitable owner, to retain the property against the administrator in the absence of a showing that the deceased left creditors. See 3 L. R. A. (N. S.) 701, note.

Under the Washington statute, the testator may empower his executors to administer his estate without the intervention of the probate court. Moore v. Kirkman, 19 Wash. 605, 54 Pac. 24 (1898); Strand v. Stewart, 51 Wash. 685, 99 Pac. 1027 (1909). But the will must be admitted to probate. Shufeldt v. Hughes (Wash.) 104 Pac. 253 (1909). In some states a residuary legatee, by giving a bond to pay all debts and legacies, is enabled to dispense with certain probate proceedings and acquires certain peculiar rights and liabilities. See Thompson v. Pope, 77 Neb. 338, 109 N. W. 498 (1906) and cases cited; In re Pope's Estate, Caulton v. Pope, 83 Neb. 723, 120 N. W. 191 (1909).

[19] Part only of the opinion on rehearing is given.

certain and uncertain, rational or impossible dispositions of the testator. All such questions are for the courts of construction, which are bound by the judgments of the courts of probate only as to the due execution." In addition to the cases cited in our former opinion, this holding is supported by Cox v. Cox, 101 Mo. 168, 13 S. W. 1055, and the cases cited at page *502 of Woerner, note 4. See, also, Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481.

It is true as stated in our former opinion, that the probate court, upon the distribution of the estate, may construe the will for certain purposes. But, as was said by Campbell, C. J., in Frazer v. Circuit Judge, 39 Mich. 198, the question to be determined upon the probate of a will is the question of will or no will. But it is contended that there may be cases in which, as bearing upon the other issues in the case, it is necessary, in the probate of a will, for the court, in some measure, to construe the will. This was not denied in the former opinion, nor was it denied the contestants in this case by the trial judge. The court, in effect, charged the jury that the provision relating to the establishment of a home for aged men and women was, in part at least, void in law, but declined to charge that this would invalidate the whole will, and in this, we think, he committed no error. If, as a matter of fact, the estate left was insufficient to establish a home for aged men and women, the proponent would take under the will, irrespective of the question of the validity of the trust. We can add little to what was said in our former opinion upon this subject. * * *

The other questions discussed on the rehearing have had full consideration, but we are not disposed to depart from our former holding, and the judgment will stand affirmed.

SECTION 3.—THE APPOINTMENT AND REMOVAL OF EXECUTORS AND ADMINISTRATORS [20]

JOHNSON v. JOHNSON.

(Supreme Court of Rhode Island, 1885. 15 R. I. 109, 23 Atl. 106.)

MATTESON, J. This is an appeal from a decree of the court of probate of Cranston, appointing an administrator of the estate of Anna Johnson, deceased. The intestate died in Cranston on the 17th day

[20] An "executor" is a person named in the will, and in consequence appointed by the court, to administer the estate of the testator. An "administrator" is a person, not named by a testator, appointed to administer the estate of a deceased An "administrator with the will annexed" (cum testamento annexo) is an administrator appointed to administer the estate of a testator where for some reason there is no executor. An "administrator de

of January, 1885. At and for several years prior to her death she had resided in Cranston, and in the family of Charles E. Johnson, the appellee, whose wife, also deceased, was her illegitimate daughter. The appellant, Walter H. Johnson, and his sister, Mary E. Seward, wife of Charles R. Seward, of Chicago, Ill., are children of the said Charles E. Johnson by his said wife, and grandchildren of the intestate. Both Charles E. Johnson and his son, the said Walter H. Johnson, made application to the court of probate to be appointed administrator. Mrs. Seward objected to the appointment of her brother, and requested the appointment of her father. The court appointed the father, and the son appealed.

The son claimed the appointment as next of kin of the intestate, under Pub. St. c. 184, § 4, which is as follows: "Administration of the estate, both real and personal, of a person dying intestate, shall be granted to the widow or next of kin of the intestate, being suitable persons, and of the age of twenty-one years, or to both, as the court of probate shall think fit." On the part of the father it was argued that Pub. St. c. 184, § 4, had no application, the son not being, in contemplation of law, next of kin of the intestate, because his mother, being the illegitimate daughter of the intestate, was not, at common law, of the kindred of the mother, though the same blood ran in their veins; and that, while Pub. St. c. 187, § 7, in these words: "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother"—has so far changed the common law as to enable illegitimate children to take and transmit inheritances collaterally on the part of their mother, the statutes have nowhere made such illegitimate children kindred of their mother, and consequently, as the mother of the appellant was not kindred of the intestate, her son is not.

If we concede the force of this argument, and grant that the appel-

bonis non" is an administrator appointed to carry on the administration of an estate where for any reason a partial administration only has been had. An "administrator de bonis non cum testamento annexo" is an administrator appointed to carry on the administration of an estate where a partial administration has taken place under a probated will. A "public administrator" is an officer designated by statute to administer the estates of persons dying intestate without relatives entitled or willing to administer. In In re Estate of McWhirter, 235 Ill. 607, 85 N. E. 918 (1908), a public administrator was held entitled to administer as against the nominee of the nonresident distributees. The statutes vary somewhat. An "administrator pendente lite" is one appointed to preserve the estate pending a contest over the appointment of a permanent executor or administrator. A "special administrator" is (1) an administrator pendente lite, and (2) an administrator for any other temporary and limited purpose. See Clemens v. Walker, 40 Ala. 189, 198 (1866). On administrators pendente lite, see 6 Am. & Eng. Ann. Cas. 263, note.

At common law an executor of an executor was ipso facto the executor of the first testator. That rule seems still to exist in a few states. See Jepson v. Martin, 116 Ga. 772, 43 S. E. 75 (1902). But in most states the rule is obsolete. In the Estate of Alexander Harper, [1909] P. 88, the executors of a sole executor and universal legatee were allowed to hold the assets of the original estate on bond without sureties, no answer having been received to advertisements for creditors.

lant is not, in legal contemplation, next of kin to the intestate, we nevertheless think that he is entitled to the appointment. If he is not to be regarded as such next of kin, then no application by such next of kin for letters of administration has been made within 30 days from the death of the intestate, and under Pub. St. c. 184, § 5, it is competent for the court to commit administration to some suitable person of full age, not a member of the court. For aught that appeared at the hearing, the appellant answers these requirements of the statute. In granting administration the primary object is the interest of the estate; hence courts have deemed it their duty to place the administration in the hands of the person most likely to convert the property to the best advantage of those beneficially interested. Other things being equal, that person will be he who is entitled as distributee, in whole or in part, to the residue of the estate after the claims of creditors have been satisfied, because of his interest. It is therefore an established principle governing courts exercising probate jurisdiction that the right to the administration of the effects of an intestate follows the property in them. In re Goods of Gill, 1 Haag. Ecc. 341, 342; Wetdrill v. Wright, 2 Phillim. Ecc. 243, 248; Ellmaker's Estate, 4 Watts (Pa.) 34, 38; Sweezey v. Willis, 1 Bradf. Sur. (N. Y.) 495–497; Hall v. Thayer, 105 Mass. 219, 224, 7 Am. Rep. 513; Thornton v. Winston, 4 Leigh (Va.) 153, 160, 162; Clay v. Jackson, T. U. P. Charlt. 71, 73; Leverett v. Dismukes, 10 Ga. 98, 99.

In 1 Will. Ex'rs 436, the author remarks that both in the common-law and spiritual courts it has always been considered that the object of the statutes of administration, 31 Edw. III, c. 11, and 21 Hen. VIII, c. 5, is to give the management of the property to the person who has the beneficial interest in it; and the inclination to effectuate this object has been so strong that in some instances not only the practice of the ecclesiastical court, but the decisions of the judges delegate, have not scrupled to disregard the express words of the statute; and he cites the cases of Bridges v. Duke of Newcastle, cited by the court in West v. Willby, 3 Phillim. Ecc. 381, and Young v. Peirce, Freem. 496. In the former, Lord Hollis had died intestate, and Bridges claimed administration as next of kin. The effects were vested by act of parliament in the duke of Newcastle, to pay the debts of the deceased. The judge of the prerogative court, and afterwards the delegates, held that the next of kin was excluded on the ground that he had no interest, and granted administration to the duke of Newcastle. In the latter, administration was refused by the prerogative and the delegates to a next of kin on the ground that she had released her interest, and the letters were granted to the party beneficially entitled to the personal estate. And see, also, Thornton v. Winston, 4 Leigh (Va.) 153, 163; Leverett v. Dismukes, 10 Ga. 98, 99.

Under our statutes of descent and distribution (Pub. St. c. 187, §§ 1, 5, 7, 9), the appellant and his sister are the persons entitled to the surplus of the personal estate of the intestate after payment of her just

debts, funeral charges, and the expenses of settling her estate. It follows, therefore, that they are the persons who would, if competent, be entitled to the administration. Mrs. Seward, however, is not an applicant, and, if she were, her coverture and nonresidence would probably be regarded as sufficient disqualifications to prevent her appointment. If there was any good reason against appointing her brother, her wishes in regard to the appointment would be entitled to consideration; but, in the absence of such reason, we cannot permit them to operate to his exclusion, he being equally entitled with herself, and both competent and desirous to act. McBeth v. Hunt, 2 Strob. (S. C.) 335; Heron's Estate, 6 Phila. (Pa.) 87, 88; In re Cresse, 28 N. J. Eq. 236, 237; Cobb v. Newcomb, 19 Pick. (Mass.) 336.

The decree of the court below must be reversed, and letters of administration granted to the appellant. Order accordingly.*

JUDGE OF PROBATE v. CHAMBERLAIN.

(Superior Court of Judicature of New Hampshire, 1824. 3 N. H. 129.)

This was an action of debt upon a probate bond, given by the defendant upon his taking upon himself the burthen of executing the will of Moses Chamberlain, deceased. The defendant was defaulted, and upon a hearing of the parties as to the sum for which execution ought to be awarded, it appeared, that the said Moses, the testator, by his will, gave to his daughter Rhoda $100, to be paid to her in one year after the decease of her mother. Rhoda having married Lemuel Wheelock, died without issue, after the decease of her father, but before the decease of her mother, leaving several brothers and sisters. The mother of Rhoda died in the year 1819. The question was, whether the husband of Rhoda was entitled to the said legacy?

RICHARDSON, C. J. At the common law, administration of the estate of a person dying intestate, belonged of right to no particular person, but it was in the discretion of the ordinary to grant administration to whom he saw fit. But the statute of 21 Hen. VIII gave the administration to the next of kin; and when there happened to be more than one of equal akin, he, who first took administration, was entitled to the surplus of the personal estate, after paying the debts. The law thus remained, until, by the statute of 22 & 23 Car. II, c. 10, administrators were made liable to make a distribution. But that statute made no express mention of a husband's administering to his wife; and as no person could be in equal degree to the wife with the husband, he was held not to be within the act. And the statute of 29 Car. II, c. 3, § 25, expressly declared, that the husband might demand

* That an adopted child had no right as such child to administer the estate of the adopting parent was held in In re Smith's Estate, 225 Pa. 630, 74 Atl. 622 (1909).

administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before the statute of the 22 & 23 Car. II, c. 10.

Since that time, it seems never to have been doubted, that a husband may administer upon his deceased wife's estate, and that he is entitled, for his own benefit, to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her and reduced to possession, or contingent, or recoverable only by action. And in case the husband dies before he administers, the right to administer, and to the property, goes to the heirs of the husband. [Citation of authorities.]

We are therefore of the opinion that the husband of Rhoda is entitled to the legacy given her by her father.[21]

COX v. MORROW.

(Supreme Court of Arkansas, 1854. 14 Ark. 603.)

WATKINS, C. J.[22] * * * In 1808 Asa Grant died in North Carolina, leaving a will, one clause of which is in these words: "I further give unto my beloved wife (Jemmima) one negro woman, known by the name of Harriet, and her issue, during her natural life, and after her death the said negro woman Harriet and her issue, I give and bequeath unto my beloved daughters, Clarissa Grant and Polly Grant, to be equally divided amongst them." Jemmima Grant, the widow, married Arthur Morrow, and they moved to Tennessee, and from thence to Arkansas, where she died in the year 1848. Clarissa Grant married Eli Cox, in Tennessee, where they continue to live. Polly Grant married Hiram Williams and they moved to Texas, where she died in the year 1845, leaving several children, the issue of their marriage, who are still living. In 1849 Williams sold and conveyed all his right, title and interest in the slaves in controversy to Pack and Cates, two of the appellants. From the time of his marriage with Jemmima Grant, Morrow always had possession of Harriet and her issue, in right of his wife, and after her death, in 1848, he continued to keep them in possession, never until then claiming them as his own. The negroes now in controversy are Delia, who is the daughter of Harriet, and George, the child of Delia.

Upon the refusal of Morrow to surrender them, when demanded by the appellants, they sued him by action of replevin in the detinet. The defendant pleaded non detinet, and a special plea asserting property in himself, with a traverse of property in the plaintiffs. The court sitting as a jury found upon the evidence, for the defendant, and he had judgment accordingly. * * *

[21] Compare In re Degnan (N. J. Prerog.) 71 Atl. 668 (1908).

[22] Part only of the opinion is given.

3. One of the questions mainly argued is whether Williams succeeded as distributee to the choses in action of his deceased wife, or her chattels not reduced into possession during the coverture; and, supposing that he would be entitled to them, whether he or any assignee of his could bring an action for their recovery, without taking out administration upon his wife's estate and suing in a representative capacity. It will be conceded that, at the common law, the custom grew up for the husband to be entitled to receive from the ordinary the delegated power of administering upon the wife's estate, and, becoming possessed of the goods as administrator, he was allowed to retain any surplus after the payment of the debts, without being required to make distribution to her next of kin. But neither the statute of 22 Car. II, requiring administrators to make distribution, nor that of 29 Car. II, exempting the husband, administering in right of his being such, from the duty of making distribution, and thus recognizing his legal right to retain the surplus, ever had any force or operation in this state. And for the source of the husband's right to administer, it would hardly be necessary to go back to the common law, superseded here by a statutory system of administration.

According to the territorial law (Steele & McCamp, Dig. title "Administration," § 4) the husband or wife had the preference, before the next of kin, in administering upon the estate of the other; and that law (Id. title "Descents and Distributions") undertook to define accurately what interest the husband, surviving his wife, should take in her real estate and slaves and personal estate in possession or in action, varied by the contingencies of her dying with or without issue. The Revised Statutes, succeeding the territorial law, re-enacted so much of it (title "Administration," § 6) as required letters to be "granted to the representatives of the intestate who may apply for the same and are qualified, preferring first, the husband, or wife, or one of the persons entitled by law to a distribution of the intestate's estate," and though the language there used would seem as if intended to apply to a state of case, where by law the husband or wife surviving would succeed, as distributee, to the whole, or some part of the estate of the other, yet the statute of descents and distributions, as remodeled by the revisors, negatives any such apparent intention. * * *

Though an examination at large of this subject, and especially as connected with a more recent enactment of December 8, 1846, enabling married women to become seised or possessed of property, real or personal, in their own right, while the former law, denying to them the general power of testamentary disposition, is retained in force, would disclose much of lamentable uncertainty and inconsistency, we have no discretion to construe away what appears to be the necessary result of the statute, whether so intended or not (1 Swift, Digest, 28; Reeves, Dom. Rel. 16; Bunch's Adm'r v. Hurst's Adm'r, 3 Desaus. 289, 5 Am. Dec. 551; Gough v. Crane, 3 Md. Ch. 127), and must conclude

that, as the law now stands, the husband surviving is entitled only to the preference in the administration of the estate of the wife, to enable him to recover her choses in action not disposed of or converted by him, and her personal property, not reduced to possession during coverture, for the purpose of paying her debts and making distribution of the surplus among her next of kin, to all of whom he is postponed in the succession.

It is not pretended that two of the plaintiffs have sued here in a representative capacity; and assuming the law to be as we have stated it, we need not inquire further whether the husband, entitled as distributee of the wife's estate, should nevertheless sue as her administrator, though we apprehend that in such case he would come under the general rule that, in an action at law to recover the personal property of an intestate, the plaintiff must derive title by or through an administrator. * * * Affirmed.[23]

SAXE et al. v. SAXE et al.

(Supreme Court of Wisconsin, 1903. 119 Wis. 557, 97 N. W. 187.)

Application by Leo E. Saxe and another for the probate of the will of Louis Saxe, deceased. At the close of the trial the circuit court found, in effect, that at the time of the probate of the will by the county court and the issuing of letters testamentary thereon to Leo E. Saxe he was legally competent to act as such executor; that some years before Leo E. Saxe gambled at times, but the nature of such gambling was not disclosed by the evidence, and it was not proved that he was ever an habitual or professional gambler; that the evidence tended to throw suspicion upon the good faith of some of the business transactions of Leo E. Saxe in previous years, but not sufficient to prove actual fraud and dishonesty on his part; that the evidence failed to sustain the objections filed to his appointment as such executor, except in the particular that he was obnoxious to the heirs who filed such objections. And as conclusions of law the court found, in effect, that Leo E. Saxe, at the time of the death of the testator and the probate of the will was, and still is at the present time, legally competent to act as such executor of said last will and testament, and was entitled to the issuance of letters testamentary to him as such executor. * * *

CASSODAY, C. J.[24] * * * The statute declares that: "When a

[23] "In this state, administration and distribution are governed by statute. The common-law right of the husband surviving the wife to exclusively administer upon and enjoy her personal estate does not here exist." Elbert, J., in Goodrich, Adm'r, v. Treat, 3 Colo. 408, 411 (1877).

Local statutes should be consulted. See, in general, 1 Woerner's American Law of Administration (2d Ed.) §§ 235, 236. On the widow's right to appointment, see Id. § 237.

[24] Part only of the statement of facts and of the opinion is given.

will shall have been duly proved and allowed the county court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent and shall accept the trust and give bond as required by law." Section 3792, Rev. St. 1898. Upon the will being admitted to probate, and Leo E. Saxe, named as executor therein, having been appointed as such, he immediately accepted the trust, and gave bond as required by law and the order of the county court. This being so, the important question is as to the effect to be given to the language of the section which declares that "the county court shall issue letters testamentary * * * to the person named executor therein, if he is legally competent." Both the county court and the circuit court found as a matter of fact and as a conclusion of law that Leo E. Saxe was legally competent to act as such executor.

The findings of the court are amply supported by the evidence. There is no claim that he was wanting in mental capacity to perform the duties of executor. The objection that he was irresponsible seems to be answered by his promptly giving the requisite bond. The other objections are to the effect that he abused his stepmother, was obnoxious to the objecting heirs, and that his character was not such as to inspire confidence and trust. The objections go to his temper, his disposition, his habits, and his moral character, rather than to his capacity to do business. Are such objections available to set aside the expressed wish of the testator?

A recent work declares that: "An executor, according to the common-law doctrine, derives his office solely from the will by which he is appointed, and not from the probate, which is held to be only evidence of his right. In many, if not all, of the states of the Union the authority of an executor, while derived primarily from the will, is not derived solely therefrom, and is not complete until the executor has qualified by complying with certain statutory requirements, and has received letters testamentary from a court of competent jurisdiction; but the nomination contained in the will cannot be disregarded by the court unless the person named is for some reason disqualified to act as executor, and the authority of the court in the premises is limited to qualifying the executor and issuing letters testamentary, and does not extend to the appointment, as that authority pertains to the testator alone." 11 Am. & Eng. Ency. Law (2d Ed.) 744, 745, cited approvingly in Re Will of Somervaill, 104 Wis. 72, 74, 80 N. W. 65. To the same effect, Schouler's Ex. & Admin's (2d Ed.) § 33. Such rule is amply supported by authority. * * *

The direction of the testator in naming his executor is not to be disregarded except as prescribed by statute. This court has recently reversed a case for failure to follow the direction of the testator in the appointment of a person to fill a vacancy as trustee. Cole v. City of Watertown, 119 Wis. 133, 96 N. W. 538. Counsel for the appellants cite Estate of Pike, 45 Wis. 391; Kimball's Appeal, Id. That was a proceeding to remove an executor under a statute now embraced in

section 3803, Rev. St. 1898. Such statute expressly authorized the county court to remove an executor who should "neglect, after due notice given by the county court, to render his account and settle the estate according to law, or to perform any judgment of the court," or who should "abscond, or become insane, or otherwise incapable or unsuitable to discharge the trust" imposed upon him. It will be observed that the several things which may thus authorize removal are all such as occur after he is appointed.

It is enough to say that the case at bar does not come within the provisions of that section. We must hold that Leo E. Saxe was legally competent to act as such executor within the meaning of section 3792, Rev. St. 1898, and hence that that statute was mandatory, and required the county court to give effect to the expressed wish of the testator by appointing him as such executor.

The judgment of the circuit court is affirmed.[25]

In re SHAW'S ESTATE.

(High Court of Justice, Probate Division. [1905] P. 92.)

Probate motion.

George Shaw died on August 12, 1904. He left a will and codicil dated respectively March 13, 1901, and September 3, 1902, whereby he named as his executors Richard Skerrett, George Overton Aston, Fanny Elizabeth Shaw, and Ellen Louisa Shaw.

On September 2, 1904, probate was granted to all except Richard Skerrett, who had previously renounced.

About September 1, 1904, Fanny Elizabeth Shaw was attacked with paralysis, rendering her unable to sign her name; and her mental faculties also became affected.

Notice of motion was now filed on behalf of George Overton Aston

[25] See Breen v. Kehoe, 142 Mich. 58, 105 N. W. 28, 1 L. R. A. (N. S.) 349, 113 Am. St. Rep. 558 (1905); Pfefferle v. Herr (N. J. Prerog.) 71 Atl. 689 (1909); Clancy v. McElroy, 30 Wash. 567, 70 Pac. 1095 (1902); In re McKnight's Will, 80 App. Div. 284, 80 N. Y. Supp. 251 (1903). See, also, 54 Am. Dec. 518, note. On the right of nonresidents to act as executors or administrators, see In re Rice's Estate, 158 Mich. 53, 122 N. W. 212 (1909); Warren & O. V. R. Co. v. Waldrop (Ark.) 123 S. W. 792 (1909); In re Peele's Estate, 85 S. C. 140, 67 S. E. 135 (1910); 1 L. R. A. (N. S.) 341, note; 113 Am. St. Rep. 562, note. On the appointment of receivers for decedent's property, see 72 Am. St. Rep. 63–66, note.

In McFarlan v. McFarlan, 155 Mich. 652, 119 N. W. 1108 (1909), a petition by the sole creditor of the estate to remove the widow as administratrix, on the ground that the intestate had conveyed property to her in fraud of the creditor and that the estate was insolvent, was denied because the creditor had an adequate remedy by suit in equity to set aside the conveyance. But see Flynn v. Flynn, 183 Mass. 365, 67 N. E. 314 (1903), where the court dismissed such a suit in equity.

and Ellen Louisa Shaw to revoke the probate, and for a fresh grant of probate to be made to themselves, reserving power to Fanny Elizabeth Shaw to take probate if and when she should recover.

The next of kin of Fanny Elizabeth Shaw had been served with notice of the motion.

GORELL BARNES, J. The note in Tristam and Coote's Probate Practice (13th Ed.) p. 191, is correct. The case of In the Goods of Sowerby is reported in 65 L. T. 764, from which it appears that the fresh grant was made, limited till such time as the lunatic executor should recover his sanity; but when the matter came to be worked out in the registry, it was probably found that the more convenient course was not to limit the grant, but to let the other executor take probate, reserving power to the lunatic to apply to join in the probate, should he desire to do so on recovering his sanity. In the present case I revoke the probate, and make a fresh grant to the applicants, reserving power to Fanny Elizabeth Shaw to join in this grant, should she, on recovering her sanity, wish to do so.

McINTYRE et al. v. PROCTOR et al.

(Supreme Court of North Carolina, 1907. 145 N. C. 288, 59 S. E. 39, 13 L. R. A. [N. S.] 438.)

Special proceedings by Stephen McIntyre and another against Lizzie G. Proctor and others to be allowed to resign, as executors of a will of Edward Knox Proctor, Jr., deceased.

HOKE, J.[26] The allegations of the petition relevant to the inquiry admitted by the answer and found to be true on the hearing are as follows:

"(3) That your petitioners have collected all the assets belonging to said estate, and have paid all debts due by the said estate, and have in all respects complied with the terms and provisions of the said last will and testament, and have made all investments as therein provided, and have satisfied all legacies to be satisfied, all of which will more fully appear from the annual accounts filed by your petitioners as executors in the office of the clerk of the superior court of Robeson county, to which said reports reference is hereby made.

"(4) That your petitioners have so far administered the said trust that nothing now remains to be done except to collect the rents and profits from the real estate owned, and the dividends from the moneys invested, and to expend such portions thereof as may be necessary for the support, maintenance, and education of the family of said E. K. Proctor, Jr., as by the said will provided.

"(5) That your petitioners are informed and believe that, under the terms and provisions of the said will, the said trust cannot be finally

[26] The statement of facts is omitted.

closed and settled until the youngest child of the said E. K. Proctor, Jr., attains his majority, and, inasmuch as said youngest child, Robert W. Proctor, is now of the age of about 8 years, it will be some 13 years before said trust can be finally closed and settled.

"(6) That the administration of the said period of 13 years will be very expensive to the said estate, and a heavy charge upon the said children and devisees of the said E. K. Proctor, Jr., the same to be the more considered on account of the fact that the utmost economy must be used in order that there may be property sufficient to provide a support, maintenance, and education for all of the said children until they attain their majority.

"(7) That the widow and all the children of the said E. K. Proctor, Jr., reside in the town of Lumberton, N. C., and no general or testamentary guardian has been appointed for the minor children. That all of the said children, except James D. Proctor, are infants and reside with their mother.

"(8) That James D. Proctor, eldest son of E. K. Proctor, Jr., has attained his majority, and is now engaged in the practice of law in the town of Lumberton, N. C., and the widow and children of said E. K. Proctor, Jr., reside with him, under his care and protection.

"(9) That your petitioners believe, and so allege, that it would be to the best interests of the widow and children of the said E. K. Proctor, Jr., if the management of the said estate and the care and control thereof could be turned over to James D. Proctor, for the reason that the said James D. Proctor, residing as he does with the others of the family, is in a better position to know their actual necessities and to exercise greater economy in their support and maintenance than can the present executors, and for the further reason that no commissions would be charged by him for his services in closing up the said trust and estate.

"(10) That your petitioners have consulted Mrs. Lizzie G. Proctor, widow of E. K. Proctor, Jr., and the children who are capable of understanding, and they agree with your petitioners, and are desirous, that your petitioners be allowed to resign as executors and trustees of the estate of E. K. Proctor, Jr., and that the said James D. Proctor be appointed in their place and stead.

"(11) That your petitioners have consulted the said James D. Proctor, and he is willing to assume the duties which would be imposed upon him in case of his appointment as substituted trustee of the said estate, and he is prepared to give such bond as the court may require of him as a condition precedent to this appointment.

"(12) That your petitioners are desirous of filing their last annual account, and of resigning their executorship and trusteeship in favor of the said James D. Proctor, and there are many reasons, business and sentimental, incapable of being set forth here, why it will be to the benefit of the widow and heirs at law of the said E. K. Proctor, Jr., that such change be made."

And on these facts we think the clerk correctly ruled that he had no power to accept the proposed resignation and appoint a successor.

At common law, using the term in its broadest sense, an administrator and executor who had duly qualified and entered on the performance of his duties had no right at his own desire and for his own convenience to resign his office, and so put aside responsibility for the further performance of his duties. This has been directly held with us in the case of Washington, Ex'r, v. Blunt, 43 N. C. 253; and without statutory authority a clerk for a like purpose has no right to permit such resignation.

Our statutes in various sections (Revisal 1905, §§ 31–34–35–37–38) confer on the clerks the power to revoke the letters of administrations for certain reasons therein specified; section 38, containing the more general provisions on the subject, being as follows: "If it is made to appear that the person to whom the letters have been issued is legally incompetent, or has been guilty of default or misconduct in the execution of his office, or that the letters have been obtained by false and fraudulent misrepresentations." And no doubt for causes specified in the statute or equivalent causes as indicated by way of suggestion only, in Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430, the clerk could permit the officer to resign and revoke the letters on such resignation.

But the power exists for the good of the estate and its proper administration, and should only be exercised by reason of some unfitness or unfaithfulness on the part of the trustee, and never simply for his convenience or because the parties interested may desire it. While the principle is well established, both as to administrators and executors, it is more especially appropriate to the case of executors who are selected by the testator himself, usually because of his knowledge of their business capacity and his confidence in their integrity or both; and, though they have in the first instance a right to decline the office, after they have accepted and are qualified, they are not afterwards permitted to resign, and voluntarily put aside its responsibilities.

This case presents a good illustration of the doctrine and its proper application. A perusal of the will and the facts submitted in connection with the administration indicates that there is a good amount of property to be invested and managed, and that the duties incident to the trust will continue for some length of time. The testator has selected two of his friends to administer his estate, and carry out his wishes, on account of their capacity and approved faithfulness, and they will no doubt continue to justify his confidence. There is no reason alleged or shown why they should be displaced, and the judgment of the clerk should have been affirmed.

Let this be certified and order entered accordingly. Reversed.[27]

[27] But see Marsh v. People, 15 Ill. 284 (1853), where the court said (page 287): "The court had power to remove him [the administrator] from office, and the acceptance of his resignation may be considered as an exercise of

SECTION 4.—THE REVOCATION OF PROBATE AND OF ADMINISTRATION [28]

SEMINE v. SEMINE.

(Court of King's Bench, 1673. 2 Lev. 90.)

Administration was granted, and the administrator by virtue thereof being possessed of a term, made a lease of the land, and after was a citation to repeal the administration, but it was affirmed; upon which sentence of affirmation an appeal was sued, and the sentence of affirmation thereby repealed, and the first administration repealed, and administration granted to another. And by HALE and the whole court, this new administrator shall not avoid the lease of the first administrator, for this is only a repeal of the sentence in the citation, and so is in the nature of a suit on the citation; and so it is all one as if the first administration had been avoided in the suit upon the citation, and not as if the appeal had originally been brought upon the first administration, which thereby had been totally annulled. 6 Co. [18b], Packman's Case.[29]

that power. The refusal of an administrator to perform the duties of his trust is a sufficient cause for revoking his authority and conferring it upon another; and the removal of one of several administrators, without appointing another in his place, devolves upon the others the entire management of the estate. The resignation may be regarded as a declaration by Mellen that he would no longer participate in the administration of the estate, and the acceptance by the court as a revocation of his authority." See, also, Thayer v. Homer, 11 Metc. (Mass.) 104 (1846); Comstock v. Crawford, 3 Wall. 396, 18 L. Ed. 34 (1865); Balch v. Hooper, 32 Minn. 158, 20 N. W. 124 (1884); Ramp v. McDaniel, 12 Or. 108, 6 Pac. 456 (1885); 13 Prob. Rep. Ann. 325, note. On the renunciation of an executor, as distinguished from his resignation, see Cooke v. Stevens, [1897] 1 Ch. 422; 7 Prob. Rep. Ann. 68, note.

[28] For a discussion of the revocation of probate of a will, see 12 Prob. Rep. Ann. 218, note.

[29] An appeal from an order appointing an administrator suspends the order. Zimmer v. Saier, 155 Mich. 388, 119 N. W. 433 (1909).

That a revocation of probate will not be ordered on issues tried and determined at the probate, except for fraud on the court, or for some accident, mistake, or misunderstanding in the proceedings before the court, which in justice calls for a revocation, is held in Boardman v. Hesseltine, 200 Mass. 495, 86 N. E. 931 (1909). Even in the case of fraud, the person seeking revocation may fail because of his delay. See Miller v. Miller's Estate, 69 Neb. 441, 95 N. W. 1010 (1903).

ALLEN v. DUNDAS.

(Court of King's Bench, 1789. 3 T. R. 125.)

This was an action on the case for money had and received to the use of the intestate, and to the use of the plaintiff as administrator, to which the defendant pleaded the general issue. And on the trial a special verdict was found, stating in substance as follows. The defendant, as treasurer of the navy, was indebted to the intestate in his lifetime in £58. 13s. 6d. for money had and received to his use. Priestman died on the 2d of June 1784. On the 13th of August 1785, one Robert Brown proved in the Prerogative Court of the Archbishop of Canterbury, a forged paper writing, dated the 18th of May 1784, purporting to be the last will of Priestman, otherwise Handy, whereby he was supposed to have appointed Brown the sole executor thereof; and a probate of that supposed will issued in due form of law, under the seal of that court, on the same day, in favor of Brown. The defendant, not knowing the will to have been forged, and believing Brown to be the rightful executor, on Brown's request paid him £58. 13s. 6d., being the whole balance then due from the defendant to Priestman. On the 21st of July 1787, Brown was called by citation, at the suit of John Priestman the father, and next of kin of the deceased, in the Prerogative Court of the Archbishop of Canterbury, touching the validity of such supposed will; and such proceedings were thereupon had in that court, that the will and probate were declared null and void; that Thomas Priestman died intestate; and that John Priestman the father was his next of kin. And on the 31st of March 1788, letters of administration of the goods, etc., of Thomas Priestman were granted by that court in due form of law to the plaintiff, as attorney of John Priestman. But whether, &c.

Ashhurst, J. I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who had at that time a legal authority to receive it. It is admitted, that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demand for it; but I think that makes no difference. For as the party to whom the payment was made had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it. This therefore cannot be called a voluntary payment. This is different from payments under forged bonds or bills of exchange; for there the party is to exercise his own judgment, and acts at his peril. A payment in such a case is a voluntary act, though perhaps the party is not guilty of any negligence in point of fact. But here the defendant acted under the authority of a court of law; every person is bound to pay deference to a judicial act of a court having competent jurisdiction. Here

the spiritual court had jurisdiction over the subject matter; and every person was bound to give credit to the probate till it was vacated. The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction. Besides, the distinction taken by the defendant's counsel between cases where a will is set aside on an appeal, or on a citation, seems to have some foundation. In the former the original sentence is as if it had never existed; in the latter, the will is only repealed, and all acts under it till the repeal are good. But the foundation of my opinion is, that every person is bound by the judicial acts of a court having competent authority; and during the existence of such judicial act, the law will protect every person obeying it.

BULLER, J.[30] The first question to be considered is, What is the effect of a probate? It has been contended by the plaintiff's counsel, first, that it is not a judicial act; and secondly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the ecclesiastical court may hear and examine the parties on the different sides, whether a will be or be not properly made; that is the only court which can pronounce whether or not the will be good. And the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it be repealed; and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect. Their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places: but where they have no jurisdiction, their whole proceedings are a nullity. * * *

Judgment for the defendant.[31]

[30] Part only of the opinion of Buller, J., is given. The concurring opinion of Grose, J., is omitted.

[31] On the validity of acts done by an executor or administrator under letters testamentary, or of administration, afterwards revoked or held invalid, see 21 L. R. A. 146 note; 11 Prob. Rep. Ann. 556, note. On revocation of probate as a termination of the appointment of an administrator with the will annexed, see 21 L. R. A. (N. S.) 975, note.

In re MEARS' ESTATE.

(Supreme Court of South Carolina, 1906. 75 S. C. 482, 56 S. E. 7.)

In the matter of the estate of J. H. Mears. Application by James F. Thames and P. H. Mears for probate of an alleged will. Application denied, and petitioners appeal.

WOODS, J.[32] * * * The court of probate, * * * on August 26, 1904, adjudged and decreed that the said Wm. H. Mears died intestate, and duly appointed M. D. Rouse, J. W. Mears, and H. W. Mears coadministrators of his said estate. These officers duly qualified, entered upon their duties, and are still engaged in performing the same. This administration has never been revoked. On October 3, 1904, S. C. Cunningham, as a judge of probate, * * * admitted to probate a written instrument, dated the 11th day of April, 1899, purporting to be the last will and testament of W. H. Mears, * * * [and] issued letters testamentary. * * * J. W. Mears and M. D. Rouse in their own right and as administrators of the estate of W. H. Mears, appealed therefrom to [the circuit court, which decided that] the will could not be probated and letters testamentary issued to the executors therein named until the previous grant of letters of administration had been revoked by a direct proceeding instituted for that purpose. [Later the probate judge again admitted the will to probate, the same parties again appealed, and the Circuit Court] adjudged this last probate of the will also to be of no force, and revoked it. * * *

2. The vital question is, may a will be admitted to probate and letters testamentary granted, without first obtaining by an independent proceeding the judicial annulment of letters of administration previously granted on the supposition of intestacy? So far as we can discover, there is no case in this state deciding this precise question. In accordance with the generally recognized doctrine, the court held in Moore v. Smith, 11 Rich. Law (S. C.) 569, 73 Am. Dec. 122, letters of administration on the estate of a living person to be absolutely void. But this is put on the ground that the fact of the death is essential to any jurisdiction whatever concerning administration, and when that fact is absent the attempt to place another, under the name of administrator, in charge of a living person's estate, is a mere usurpation. But a probate court has jurisdiction of the administration of the estates of deceased persons, whether they die testate or intestate, and hence its judgment as to testacy or intestacy is valid until set aside by a proper proceeding instituted for that purpose.

The doctrine is also established in this state that the acts of an administrator in the due course of administration are valid, although a will be afterwards discovered and admitted to probate (Benson v. Rice, 2 Nott & McC. [S. C.] 577) and this is true, though administration be

[32] Part only of the opinion is given.

obtained by fraudulent suppression of the will. Foster v. Brown, 1 Bailey (S. C.) 221, 19 Am. Dec. 672; Price v. Nesbit, 1 Hill's Eq. (S. C.) 461. This rule, so long ago adopted by our courts, is now generally recognized. Dobler v. Strobel, 81 Am. St. Rep. 555, note. The meaning of the rule is that the will does not impair the validity of the administration until adjudged by the proper authority to be the will, but it does not mean that the will may be admitted to probate and the administration thereby ended. True, there is support in reason and authority for the proposition that, after discovery of a will, administration previously granted cannot be impeached in a collateral proceeding, and can be annulled only by a direct proceeding. But the probate of a will is practically a direct proceeding looking to placing a testator's property in the hands of his executors, and adjudging that all others, including administrators having it in possession, should surrender it to the executors for administration. Indeed, it is the proceeding laid down in the statute to the exclusion of all others.

If the view should be adopted that a will could not be probated until a decree had been obtained in an independent proceeding annulling a previous grant of letters of administration, the whole question of will or no will would necessarily be tried in such independent proceedings, whereas the statute provides it must be tried only in proceedings instituted to have the will admitted to probate. Though a different rule prevails in some jurisdictions, in this state if an administrator moves out of the state the grant of letters to another is equivalent to a judgment of revocation. McLaurin v. Thompson, Dud. 335.

The case of Petigru v. Ferguson, 6 Rich. Eq. (S. C.) 378, is not an authority to the contrary, for the principle was different. Holding the intestate to have been a resident of that county, the ordinary of Abbeville granted letters of administration. Subsequently the ordinary of Edgefield county also issued letters, holding the intestate to have been a resident of Edgefield. The court of appeals did hold the second grant null because the first had not been vacated, but, in that instance, the first grant could not be regarded annulled by the second for the reason that the ordinary of Edgefield county had no jurisdiction to revoke letters of administration issued by the ordinary of Abbeville county. If the ordinary of Abbeville county, who had issued the first, had also issued the second letters, this would have been a revocation of the first administration, under the authority of McLaurin v. Thompson, supra.

We conclude the probate of the will of W. H. Mears was the proper legal proceeding looking to the revocation of the previous administration, and the only remedy for those who had been appointed administrators was to require proof of the will in solemn form.

On these grounds, the judgment of the circuit court is reversed.

STEELE v. RENN.

(Supreme Court of Texas, 1878. 50 Tex. 467, 32 Am. Rep. 605.)

MOORE, C. J. This is an action of trespass to try title, brought by appellees December 12, 1872, for the recovery from appellants of lots 3 and 4 in block 23, in the town of Rusk, Cherokee county, to which both parties claim title under Casper Renn, deceased, in whom the title is admitted to have been at his death. Appellees claim as the heirs, and appellants as purchasers in good faith from H. K. Joice and wife, who claimed as devisees of Renn.

On the 23d of December, 1864, Casper Renn died in Rusk, Cherokee county, where he had for some years previous resided. In January, 1865, an instrument purporting to be his last will and testament was presented to the court for probate by the parties therein named as executors. Said instrument authorized said executors to administer and settle up the estate in accordance with its terms without being subject to the supervision and control of the court. After due notice of the application had been given, the execution of the instrument was inquired of by the court, whereupon it was adjudged to be the last will and testament of said Casper Renn, deceased; and the property and effects belonging to his estate were committed to said parties named as executors, to be by them administered under and in pursuance of the authority purported to be given them therein.

On the 3d of March, 1865, said executors made and delivered to said Joice and wife a deed for said lots devised to them by said will; and on the 2d of December, 1865, said Joice and wife, in consideration of $275 paid them by Richard G. Steele, as recited in their deed, sold and conveyed them to said Steele, from whom they were subsequently purchased by appellant Carter.

Appellees, who are brothers and sister to Casper Renn, deceased, were at the date of his death, and most of them seem to be still, citizens of Germany. Some time in the summer of 1865 B. Renn, one of the appellees, came to Rusk, Cherokee county, where he has since resided, to look after the estate of his brother on behalf of his brothers and sister, as well as himself; and in November, 1866, prior to the sale of the lots from Steele to Carter, suit was instituted by said B. Renn in the name of the brothers and sister, heirs of said Casper Renn, deceased, to set aside and revoke the probate of said will, charging the same to be a false and spurious instrument, and not in fact the will of said Casper Renn, deceased. In 1873 it was finally so determined and adjudged by this court, and its probate ordered to be revoked and annulled.

On the trial, the facts here stated having been proved, appellants introduced evidence tending to prove that they purchased the lots in good faith, and claimed to be entitled to the protection of the court as purchasers for value without notice that said instrument was not

the true and genuine will of Casper Renn, deceased, as it purported and had been adjudged to be by its probate; whereupon the court instructed the jury, among other things, as follows: "The plaintiffs have produced in evidence a conclusive judgment setting aside the pretended will of Casper Renn, deceased, and declaring it null and void, and that his heirs at his death were invested with the ownership of all of his estate. When Steele purchased from Joice he took no better title than Joice had, which has been shown to be none at all, and he took the title at his own risk."

If this is a correct view of the law, evidently appellants have no title and have no just cause to complain of the recovery of the lots by appellees. On the other hand, if it is erroneous, as it necessarily controlled the verdict of the jury to the prejudice of appellants, the judgment must be reversed.

The practical importance of the question raised by this charge is obvious. If the views of the court are held to be correct, no title derived from a devisee but may be swept from under the purchaser at any time, however remote, while the probate of the will is subject to attack. This fact when known must cast a cloud on all such titles, lessen their market value, and retard their transfer. On the other hand, if the instruction does not correctly state the law, our probate system affords but slight safeguards to nonresident heirs against perjury and fraud. These considerations induced this court to refrain from a decision of this case for several terms, and to call upon the counsel for a more thorough examination of the law applicable to it than had at first been made by them; but we regret to say that so far they have cited us no case bearing directly upon the point presented, and we have, to a considerable extent, to decide it as an original question.

Appellants insist that they are entitled to protection as innocent purchasers notwithstanding the invalidity of the will from which their title springs. In support of their proposition they refer us to the case of Jones v. Powles, 10 E. C. R. 310, 3 Myl. & K., 581. But this case merely illustrates the rule of equity protecting purchasers in good faith who get in the outstanding legal title, but leaves unsettled the main difficulty, viz.: Although he may have purchased in good faith, did Steele occupy a better position than Joice and wife would if they had not sold the lots? Unquestionably their title in such event would have fallen with the revocation of the probate of the instrument by which they purport to have been devised to them. Gaines v. New Orleans, 6 Wall. 642, 18 L. Ed. 950; Gaines v. De La Croix, 6 Wall. 719, 18 L. Ed. 965. But while our conclusion has not been reached without hesitancy and embarrassment, we think, notwithstanding the damage to which absent and nonresident heirs may thereby be exposed, he does, if he in fact purchased in good faith, and that public policy requires this solution of the question.

An application for the probate of a will is a proceeding in rem, and the judgment of the court upon it is binding upon all the world until revoked or set aside. Hodges v. Bauchman, 8 Yerg. (Tenn.) 186; Scott v. Calvit, 3 How. (Miss.) 158; State of California v. McGlynn, 20 Cal. 271, 81 Am. Dec. 118; 3 Redf. on Wills, 63.

Now, it has often been held that acts done under authority, by the judgment of a court having jurisdiction of the estate, even where it is being administered under a forged will, are just as valid and effectual as if the will had been genuine; that a payment voluntarily made to the executor named in a forged will is a valid discharge of the debt. Though the will may be afterward set aside and annulled, the debtor cannot be required to pay the debt a second time.

If the pretended will had required the executors to settle the will of Renn in the probate court, the acts done by them in pursuance of the orders of the court carrying into effect provisions of the will could not be impeached or set aside to the injury of innocent parties, because they have a right to rely upon the validity of the judgment of the court. Moore v. Tanner's Adm'r, 5 T. B. Mon. (Ky.) 42, 27 Am. Dec. 35; Parker v. Parker, 11 Cush. (Mass.) 519; King v. Bullock, 9 Dana (Ky.) 41; Thompson v. Thompson, 9 Pa. 234; Wyman v. Campbell, 6 Port. (Ala.) 243; Ballow v. Hudson, 13 Grat. (Va.) 682.

Is there any difference in respect to the powers of the executors where the purported will directs the settlement of the estate out of the court? By its judgment the court has declared the instrument to be genuine. This judgment is binding upon all the world until reversed or annulled. Must innocent parties, when they act upon the faith of such judgments, do so at the peril of its being subsequently shown to be erroneous? There is evidently a broad distinction in the position of a party claiming to be an innocent purchaser from one who has merely a forged deed, and that of a like purchaser from the devisee in a forged will. In the former case the true owner is neither charged with notice of the forged deed, nor is he in any way committed to or estopped from denying its validity; while in the latter the will is adjudged to be valid by a court of competent jurisdiction, in a proceeding to which the heir is a party. While it is in force the heirs are bound by it, and cannot deny its correctness or dispute the validity of the devise. The purchaser from the devisee is authorized by the judgment to buy from him on the faith of a valid judgment of a court of competent jurisdiction, to which the heirs are parties, by which it has been in effect determined that the estate of the testator vested in the vendor on the testator's death. The heirs being bound by the judgment, they occupy the position of one who has voluntarily parted with or been divested of his title, and then stands by and sees it sold to a purchaser in good faith without a word of complaint. That he afterwards asserts his title and has the judgment reversed, or gets a decree canceling the probate of the will, does not mend the matter.

The purchase has been consummated. If by the subsequent reversal of the judgment he can annul the purchaser's title, he makes an innocent party the victim of his negligence and delay, and all distinction between bona fide and mala fide purchasers is destroyed.

For the error in the charge of the court the judgment is reversed and the cause remanded. Reversed and remanded.[33]

SHEPHARD v. RHODES.

(Supreme Court of Illinois, 1871. 60 Ill. 301.)

THORNTON, J.[34] The deceased died testate, in Pennsylvania, where his will was proved and recorded. At the time of his death he had creditors, and owned real estate, in Illinois.

Without any knowledge of the existence of the will, letters of administration were granted to Quimby, in this state, and after the discovery of the will they were revoked, and letters with the will annexed were granted to appellant.

If the letters to Quimby were valid, then the claim of appellees is barred, having been presented after the lapse of two years from the grant of the letters, and it was error to allow it to be paid in the due course of administration.

The only question, therefore, presented by the record, is, were the first letters void, or only voidable?

It is laid down in Toller's Law of Executors, p. 119, that a grant of administration, before probate and refusal, shall be void if the will shall afterwards be proved, although it were suppressed or its existence were unknown. The author declares the administration a nullity in such case, because the interest of the executor is incapable of being divested. This is referred to and relied upon by counsel for appellees, to show the grant to Quimby void.

There is a difference in the facts between the case supposed and the one at bar. In this case the probate had been made [in Pennsylvania, October 15, 1866], and the executors had refused to accept, before the appointment of Quimby [in Illinois, August 5, 1867].* The grant of administration to him did not, therefore, divest the executors. They had voluntarily deprived themselves of all right and interest, and the reason assigned for the nullity of the administration did not exist.

Reference was also made to 1 Williams on Executors, 367, where it is said: "If administration be granted on the concealment of a will,

[33] See Foulke v. Zimmerman, 14 Wall. 113, 20 L. Ed. 785 (1871); Thompson v. Samson, 64 Cal. 330, 30 Pac. 980 (1883). But see Fallon v. Chidester, 46 Iowa, 588, 26 Am. Rep. 164 (1877).

[34] The statement of facts is omitted.

*Quimby did not learn that deceased died testate until May, 1868, when his letters were revoked on his petition and letters with the will annexed granted to Henry M. Shephard.

and afterwards a will appear, inasmuch as the grant was void from the commencement, all acts performed by the administrator in that character shall be equally void."

The same author says, on page 370, that, whether the administration be void or voidable, a bona fide payment to the administrator of a debt due to the estate will be a legal discharge of the debtor. See, also, Toller, 129. It was also held, in Allen v. Dundas, 3 T. 125, that the payment of money to an executor who had obtained probate of a forged will, was a good discharge.

If all the mesne acts of an administrator, between the grant of letters and the revocation, are void, then there is a manifest inconsistency in the reasoning in the books to which reference has been made. From a careful reading of the text of Toller and Williams, both writers make a marked distinction between revocation on appeal and on citation. An appeal suspends the grant, and upon reversal it is as if it had never been; and hence, upon appeal and reversal, the intermediate acts of the administrator are invalid. The object of the citation is different; it is to countermand or revoke the former letters.

In this case, the revocation partook somewhat of the character of a citation. The first administrator had been appointed for ten months, and upon discovery of the will presented his petition for letters with the will annexed. The court then revoked the administration and appointed appellant.

The principles of law adverted to, as laid down in the books, cannot be strictly applicable to this case. The executors had renounced before the grant of administration, and the test that the grant must be in derogation of the right of an executor did not exist.

Even if it were the rule of the common law that letters of administration were void where a will was in existence, we do not think, in view of our statute, that the rule obtains in this state.

The chapter of the statute entitled "Wills" provides, in the condition of the bond required to be given by each administrator, that if a will should afterwards appear and be proved in court, and letters testamentary be granted thereon, the administrator shall deliver up the letters of administration. It is enacted by section 71, as follows: "If, at any time after letters of administration have been granted, a will of the deceased shall be produced and probate thereof granted according to law, such letters of administration shall be revoked and repealed, and letters testamentary, or of administration, with the will annexed, shall be granted in the same manner as if the former letters had not been obtained." Section 72 provides for the repeal and revocation of letters granted upon a will, where the latter has been annulled by due course of law. Subsequent sections confer the power to revoke and repeal letters for numerous causes.

It would, therefore, seem that the legislature had provided for the case at bar. The power to repeal, implies the power to make, a law. The revocation of an order or decree must be the act of an authority

which has the power to publish it. The power to revoke and repeal letters of administration upon the production and probate of the will, necessarily presupposes the power to grant the administration.

Chancellor Kent (2 Com. 413) says: "It is the received doctrine, that all sales made in good faith, and all lawful acts done, either by administrators before notice of a will, or by executors or administrators who may be removed or superseded, or become incapable, shall remain valid, and not be impeached on any will appearing, or by any subsequent revocation."

In Wight v. Wallbaum, 39 Ill. 554, this court held, that any mistake in the grant of letters of administration did not make them void; that, whether a will was properly proved or not, could not affect the validity of the letters or a sale of property made by the administrator; and that, where jurisdiction existed of the subject-matter and of the parties, the judgment must be conclusive, except in a direct proceeding for its reversal.

This is not a direct proceeding for the reversal of the grant. The question as to the validity of the first letters arises collaterally. In this case, it is as necessary to hold the grant voidable only, for the protection of creditors, and to make the bar of the statute effectual, as if third parties had acquired rights from a sale of property, or other acts of the administrator. If the first grant was void, the creditor who presented his claim within two years will receive no reward for his vigilance, for the assets must be shared with creditors who have been less diligent.

The county court had cognizance of the subject-matter, the proper application was made, and the judgment of the court was properly exercised. The grant of administration was, then, made by a court of competent jurisdiction.

The judgment was for a legal purpose, to reach the property of the deceased for the satisfaction of his debts, and, under the facts, was not in derogation of the rights of the executors.

The claim of appellees should have been allowed to be paid out of any estate to be discovered subsequent to the bar of the statute, which commenced to run from the date of the first grant of letters.

The judgment is reversed and the cause remanded. Judgment reversed.[35]

[35] See Barkaloo's Adm'r v. Emerick, 18 Ohio, 268 (1849); Kittridge v. Folsom, 8 N. H. 98 (1835); Franklin v. Franklin, 91 Tenn. 119, 18 S. W. 61 (1892); Zeigler v. Storey, 220 Pa. 471, 69 Atl. 894, 17 L. R. A. (N. S.) 878 (1908).

In Perkins v. Owens, 123 Wis. 238, 243, 101 N. W. 415, 416 (1904), it is said: "If letters of administration be issued on the mistaken idea that no will was left, and a will be afterwards found and proven, the letters of administration will of course be revoked, and all acts of the county court, inconsistent with the due administration of the estate under the terms of the will, will doubtless be revoked upon motion; but such action will not be based on the idea that all such acts have been void for lack of jurisdiction, but rather on the ground that they have been erroneous. The county court has administered on the estate in the wrong way; it has not admin-

istered an estate over which it has no jurisdiction." See, also, 21 L. R. A. 146, note; 17 L. R. A. (N. S.) 878, note. In Crocker v. Crocker, 198 Mass. 401, 410, 84 N. E. 476 (1908), in suggesting a bill to review as the proper course for an aggrieved party to pursue where a will has been rejected and administration granted because a juror was bribed to give his verdict against the will, the court said: "So far as the administrators have acted in the settlement of the estate under orders and decrees of that [the probate] court, they will find in them sufficient protection. Pierce v. Prescott, 128 Mass. 140. Harris v. Starkey, 176 Mass. 145 [57 N. E. 698, 79 Am. St. Rep. 322]. If the facts here alleged are proved in that court, they will present a question similar to that which would arise if a will were discovered after the appointment of an administrator."

But in Ellis v. Ellis, [1905] 1 Ch. 613, it was held that an acknowledgment by payment made by an administrator would not raise the bar of the statute of limitations, where there really was a will naming an executor, and where on the probate of that will the grant of letters of administration was revoked. The opinion of the court was on the ground that the grant of letters of administration was "wholly void." See, also, Woolley v. Clark, 5 B. & Ald. 744 (1822).

In Craster v. Thomas, [1909] 2 Ch. 348, it was held under the Indian Succession Act, that the grant of letters of administration in India on the estate of a resident of England who died owning assets in India was not void ab initio, despite the fact that he left a will appointing executors, and, accordingly, a sale of shares of stock by the administrator in India to a bona fide purchaser was valid. The court distinguished the case from Ellis v. Ellis, supra, on the ground that in Ellis v. Ellis, if the court had known of the will, the appointment of an administrator would have been improper, whereas in Craster v. Thomas, if the Indian court had known of the will, still as the will named executors who were not residents of India, that court's proper course would have been to appoint an administrator with the will annexed. That an administrator was appointed without making him one with the will annexed was deemed immaterial, since it was proper to appoint some kind of an administrator, and since even an administrator with the will annexed would have taken title, not by virtue of the will, but by virtue of the grant of the court It was also held that the true construction of the Indian Succession Act made the grant of letters in India void only from the date of the order of revocation.

CHAPTER II

THE TITLE AND POWERS OF EXECUTORS AND ADMINISTRATORS

SECTION 1.—WHAT INTERESTS BELONG TO EXECUTORS AND TO ADMINISTRATORS

HOVEY v. PAGE.

(Supreme Court of Maine, 1867. 55 Me. 142.)

DANFORTH, J.[1] This action was commenced by the plaintiff's intestate in her lifetime, and is for an alleged breach of promise of marriage. That such an action does not survive at common law, without an allegation of special damage, is well settled. Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; Smith v. Sherman, 4 Cush. (Mass.) 408. Nor does it come within the provisions of Rev. St. c. 87, § 8. In this case, no special damage is alleged, but there is an offer to prove, for which the same effect is claimed, "that, after such alleged promise, the deceased had a child born to her out of wedlock, now living, and that the defendant is the father of the child." It is not necessary now to decide whether such testimony, with or without an amendment of the declaration, would be admissible; for we are of the opinion that, if the facts stated in the offer were proved, there would not be such special damage as to authorize the prosecution of the suit. In order to do so, it must be such as to affect the property and not such as is purely personal. The distinction between actions which do not survive, and those which do, is that the former are to recover damages to the person only and the latter damages to the property. If any others survive it is by virtue of statutory provisions. Hence, the allegation of special damage which would cause the action to survive, must be of damage to the property, and such as would be sufficient of itself to sustain a suit.

That such was the understanding of the court in Stebbins v. Palmer is evident from the last sentence in the opinion, by which it is left in doubt whether, in case the action survives, the plaintiff would recover any more than the damage to the property.[2] In Smith v. Sherman it

[1] The statement of facts is omitted.

[2] Stebbins v. Palmer, is reported post, at page 592.

is held "that it must be some damage of such a character that it might be given in evidence, to aggravate the damage in one action, or be itself the substantive cause of action, as in trespass quare clausum and conveying away the plaintiff's goods." As a matter of principle, it is evident that the effect of proof offered for the purpose of aggravating the damage, or to sustain special damage, could not be greater than if offered in a separate action, for that which is merely incidental to the principal thing must fall when the principal falls, and that which would not of itself sustain an action would not cause one to survive which would otherwise abate. Now the testimony offered and relied upon in this case, if admissible, would increase the damages only on the ground of injury to the character and not to the estate; nor would it of itself sustain an action, for, if seduction is relied upon, the plaintiff's intestate, if living, would have no legal cause of complaint. Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95. If the expense of supporting the child is relied upon, the only remedy is that provided by statute. 2 Kent's Com. 215.

Plaintiff nonsuit.[3]

[3] "The general rule of law is, 'Actio personalis moritur cum persona'; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased; all such as arise out of the unskilfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate, but would operate rather as an extinction of it; though that circumstance might have been compensated by other advantages. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shown to be, privy, we are of opinion that, in the absence of any authorities, this administrator cannot maintain this action." Lord Ellenborough, C. J., in Chamberlain v. Williamson, 2 M. & S. 408, 4 (1814).

RAYMOND v. FITCH.

(Court of Exchequer, 1835. 2 C., M. & R. 588.)

LORD ABINGER, C. B.[4] The demurrer to the first breach gives rise to this question, whether an executor can sue for the breach of this covenant, not to fell, stub up, head, lop or top, timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator; and no part of the timber, loppings, or toppings, appearing to have been removed by the defendant. This question was argued in the latter part of the last term, before my Brothers PARKE, BOLLAND, GURNEY, and myself, and stood over, that we might more attentively consider how far the modern decisions, referred to on the argument, had overruled or qualified the old authorities. Those authorities are uniform, that the present representative may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, broken in his lifetime; and the reason appears to be, that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the statute 4 Edw. III, c. 7,[5] but is a common-law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim, that "Actio personalis moritur cum persona," is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law. * * *

The rule that the executor may sue upon every covenant with his testator broken in his lifetime, has been directly qualified by the decisions in the two cases of Kingdon v. Nottle, 1 M. & Selw. 355, and 4 M. & Selw. 53, followed by that of King v. Jones, 5 Taunt. 518, 1 Marshall, 107, in which cases it was held, that, where there are covenants real, that is, which run with the land and de-

[4] The statement of facts and a part of the opinion are omitted.

[5] That statute, passed in 1330, was: "Item, Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; (2) it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner, as they, whose executors they be, should have had if they were in life." While the statute gave executors an action, "the equity of the statute" was held, in Smith v. Colgay, Cro. Eliz. 384 (1595), to enable an administrator to maintain trespass de bonis asportatis for the taking of the chattels of the intestate during the latter's life. For a consideration, historically, of the doctrine of the equity of a statute, see 58 Am. Law Reg. (O. S.) 76.

scend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go no farther, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grow could not sue; the executor would be the proper party, as the covenant is collateral, and is intended not to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or devisor, and the executor therefore must sue, or all remedy is lost. These decisions, therefore, do not affect the present case. The old authorities, with respect to the right of the personal representative to sue on all contracts made with the deceased, have also been qualified by the modern decision of Chamberlain v. Williamson, 2 M. & Selw. 408, in which it was held, that the administrator of a woman could not sue for a breach of contract to marry the intestate, the declaration not stating any ground of injury to the personal estate; and in giving judgment Lord Ellenborough enumerates other instances of contracts, the breach of which imports a damage only to the person of the deceased, such as implied contracts by medical practitioners to use a proper portion of skill and attention, which cases are in substance actions for injuries to the person, and for which the personal representative could not sue; and the argument on the part of the defendant in this case was, that the same limitation of the old authorities must be applied to all contracts except such as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts are under seal or not; and that upon such contracts the executor could not sue without alleging a special damage to the personal estate. The case certainly does not go that length; and we think that such an extension of the doctrine laid down in it is not warranted by law, and that it cannot be extended to a contract broken in the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal.

The present case is one of that description—it is a case more favorable to the executors than those of Morley v. Polhill [2 Ventr. 56, 3 Salk. 109, pl. 10], Smith v. Simonds [Comberbach, 64], and Lucy v. Levington [2 Lev. 26, 1 Ventr. 176], in which the covenant did run

with the land; and if the last case [where the executor recovered for a breach in his testator's life of a covenant for quiet enjoyment] is to be considered as having been decided, as was suggested in the argument before us, on the ground that the loss of rents and profits by an eviction of the testator was an injury to the personal estate (though such a ground is not intimated in either report), it is difficult to say that the loss of the shade and casual profits of trees is not equally so. We therefore think that our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

BRADSHAW v. LANCASHIRE & Y. RY. CO.

(Court of Common Pleas, 1875. L. R. 10 C. P. 189.)

At the trial, before Denman, J., at the last Manchester spring assizes, the facts were as follows: The female plaintiff was the executrix of the testator, and he, while traveling on the defendant's railway, had been injured by a railway accident. He ultimately died from the injuries received, and it was not disputed that he had incurred expenses for medical attendance amounting to £40, and that the loss occasioned to his estate in respect of his being unable to attend to business previous to his death was £160.

It was contended, however, on the part of the defendants, that the maxim "Actio personalis moritur cum persona" applied, and that the action was not maintainable; and, secondly, that the damages for loss of business were too remote. The verdict was entered for the plaintiffs for £200, leave being reserved to the defendants to enter a verdict for themselves or to reduce the damages on the above grounds.

A rule nisi had been obtained accordingly.

GROVE, J.[6] I am of opinion that this rule should be discharged. The action is brought by the executrix of a person whose death was caused by a railway accident, in respect of damages occasioned to the testator's estate. It is to be taken that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, the direct and natural result of the injury he suffered. It is no doubt singular that up to the case of Potter v. Metropolitan District Ry. Co., 30 L. T. (N. S.) 765, no action of this kind appears to have ever been brought, a circumstance which has been sometimes relied on as an argument against sanctioning a new form of action.[7] It may, however, be that

[6] The statement of the pleadings and parts of the opinions relating to damages are omitted.

[7] In Potter v. Metropolitan District Railway Co., 30 L. T. (N. S.) 765 (1874), the plaintiff as the executrix of her late husband brought an action to recover compensation for the loss sustained to his estate, because the defendant did not safely carry the plaintiff after it had received her as a passenger, and in

this is accounted for by the comparative infrequency of accidents of this sort in former times, and the fact that until Lord Campbell's act the right to damages for the personal injury, as compared with which the damages to the estate would generally be a small matter, was lost by the death of the party injured. The same argument might have been applied to the action in Potter v. Metropolitan District Ry. Co., up to the decision of which case no action of the kind had ever been heard of, so far as I know, if we except the case put by way of illustration by Richardson, J., in Knights v. Quarles, 2 B. & B. 102.

The Court of Exchequer Chamber, nevertheless, held in that case that the action would lie, and by their decision we are bound, unless the present case is so far distinguishable as to render the same principle inapplicable. I am of opinion that it is not, and there is a sufficient ground of action here. The ground of action in both cases is that there has been a breach of a contract made with the testator during his lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident.

Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact, that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's act, take away any right of action that the executrix would have had but for that act? It does not seem to me that the act has that effect, either expressly or by necessary implication. The intention of the act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the act. Another argument for the defendants was, that inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two

consequence of the injuries suffered she was unable to assist her husband in his business, and he incurred expenses for her medical and other attendance. A demurrer to the declaration was overruled, on the ground that "here there has been a breach of contract which has caused a loss, which has fallen upon the personal estate." That the right of a husband to consequential damages to him from defendant's actionable injury of the wife is not barred by the fact that she dies as a result of the injury and that a recovery for her death is had by the administrator for the statutory beneficiaries is held in Mageau v. Great Northern Ry. Co., 103 Minn. 290, 115 N. W. 651, 946, 15 L. R. A. (N. S.) 511 (1908). See, 14 Am. & Eng. Ann. Cas. 554, note.

sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of Potter v. Metropolitan District Ry. Co., or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death. For these reasons, I am of opinion that the action is maintainable. * * *

DENMAN, J. I am of the same opinion. Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator, and at the trial two heads of damage were shown: viz., £160, damage in respect of the business, which it was agreed had suffered to that amount, and £40, medical and other expenses. I am of opinion that the plaintiffs are entitled to retain the verdict for the full amount of £200.

The first question was, whether the action can be maintained at all. The action is for a breach of contract occurring in the lifetime of the testator, but which ultimately caused his death. And it was urged that the case fell within Lord Campbell's act, that the only action that could be brought was under that act, and that these damages could not be recovered as damages to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do.

In Williams on Executors, vol. 1, p. 798, a work in itself of great authority, all the cases on the subject are commented upon and the law is stated entirely in accordance with the dictum of Richardson, J., in Knights v. Quarles. It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of the defendant, before the death of the testator. The case of Alton v. Midland Ry. Co., 19 C. B. (N. S.) 213; 34 L. J. (C. P.) 292, is also referred to in a note; and it is clear the learned author, who was a judge of this court, when that case was decided, looked upon the dictum of Willes, J., in that case as a confirmation of the opinion of Richardson, J., in Knights v. Quarles. He proceeds, however, to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of Chamberlain v. Wilkinson, 2 M. & S. 408, viz., that an action by the executor for breach of contract will not lie where the damage is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record, and so the executor could not have an action because the only damages recoverable were purely personal. Here, the damages are not personal in their nature, but are damages to the estate,

and the case falls therefore within the rule as laid down by Sir Edward Vaughan Williams, and not the exception.

Again, the case of Potter v. Metropolitan District Ry. Co., though not exactly in point, is to some extent an authority in favor of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it clearly is so here. There the wife was the person to whom the injury was done, and she sued as executrix to her husband who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death, and consequently is not on all fours with the present. The principle, however, of the decision is quite consistent with our judgment in this case. The rule to enter a nonsuit must for these reasons be discharged. * * *

Rule discharged.[8]

WYMAN v. WYMAN.

(Court of Appeals of New York, 1863. 26 N. Y. 253.)

John R. Wyman, the plaintiff's intestate, died in January, 1859, seised of a hotel, on which he had effected insurance to the amount of $3,000. The policies ran to Wyman, "his executors, administrators, or assigns," and contained this clause, "the interest of the insured in this policy is not assignable unless by consent of this corporation, manifest in writing, and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall be void and of no effect." Wyman died wholly insolvent, leaving a widow, the plaintiff, who took out letters of administration, and two children, his heirs at law, who were defendants. In October succeeding Wyman's death the insured property was destroyed by fire. The insurers adjusted the loss and paid the amount to David M. Prosser, Esq., who had been appointed guardian of the infant heirs, under a stipulation entered into by all the parties concerned that Pros-

[8] See Kelley v. Union Pac. Ry. Co., 16 Colo. 455, 27 Pac. 1058 (1891). But see Holton v. Daly, 106 Ill. 131 (1882). In Illinois, however, "if an injured person dies from some cause other than the injury, the cause of action for damages to the time of his death survives under section 122 [chapter 3, Hurd's Rev. St. 1908]. Holton v. Daly, supra; Savage v. Chicago, Joliet Ry. Co., 238 Ill. 392, 87 N. E. 377." Scott, J., in Devine v. Healy, 241 Ill. 34, 41, 89 N. E. 251, 253 (1909). See, also, McLaughlin v. Hebren Mfg. Co. (C. C.) 171 Fed. 269 (1909). On concurrent actions for death and injury, see 34 L. R. A. 801, note. On several actions for wrongful death, see 34 L. R. A. 788, note; 8 L. R. A. (N. S.) 384, note; 14 L. R. A. (N. S.) 893, note. In Pulling v. Great Eastern Railway Co., 9 Q. B. D. 110 (1882), where there was no contract between the parties, but the intestate was injured by the negligence of the defendant and incurred medical expenses before his death, recovery by the administratrix for such expenses was refused. Bradshaw v. Lancashire R. Co., supra, was distinguished from this tort action on the ground "that in that case the action was an action of contract."

ser should hold the money subject to the direction of the court, to be paid to the parties to whom it might be adjudged to belong, the heirs, the administratrix or certain creditors, who, before the intestate's death, had recovered judgment against him, which was a lien on the insured property for an amount exceeding its value. Prosser insisted upon his right to hold the money for the heirs, and the action was in the nature of a bill of interpleader to try the right of the several parties. The decision of the Supreme Court, at General Term in the Seventh District, was that the plaintiff, as administratrix of Wyman, was entitled to the money, and not the heirs at law. From this judgment Prosser, as guardian of his wards, appealed to this court.

EMOTT, J. The condition in the policy which is cited by the appellants refers to assignments or transfers of the policy itself or of the interest of the assured therein, and not to transfers of the title to the building insured, or the land on which it stood, whether such transfers are voluntary or by operation of law. The clause is to the effect that the interest of the assured in this policy is not assignable; and it is a transfer or termination of the interest of the assured in the policy, and not in the premises insured, which, when made without consent, is to avoid the policy under this condition.

Policies of insurance against fire, however, are personal contracts with the assured. They are agreements to indemnify him against loss, and not guarantees of the immunity of the property insured. Such contracts do not attach to the realty, nor do they pass as incident to a conveyance or transfer of the title to lands. In the present instance, as ordinarily with us, in policies of insurance against fire, the contract is made with the assured, "his executors, administrators, and assigns." Both by force of these words, and from the nature of the contract itself, the right of action upon the policy at the death of John R. Wyman vested in his personal representative. It is not easy to see how any one but his administratrix, the present respondent, could have sustained actions on these policies which had been issued to John R. Wyman, for any loss, whether it had occurred before or after his death. It would have been a sufficient answer to any such action by the heirs, upon a policy of insurance, that it was a personal contract to which they were not parties, and that the right of action which it gave passed upon the death of the original assured to his personal representative, who not only succeeded to all his mere rights of action, but was specifically named in this contract itself.

This, however, is not an action to recover on a policy for a loss; nor is the question between the insurance companies and these parties, or either of them. The companies have indeed, as far as it lay with them, waived any condition in the policies, or any objection to the payment of the loss. The insurance money was paid to David M. Prosser, under a stipulation by which he became in effect a stakeholder, and by which the ultimate disposition of the money is left to the judgment of the courts upon the rights of the parties. The present is an equi-

table action to ascertain and determine those rights. The plaintiff claims this money as personal property and part of the assets of the estate of John R. Wyman, to which she is not only primarily but absolutely entitled as his administratrix; while the defendants insist that it belongs to them as his heirs at law, and the owners of the real estate upon which the building stood which was insured in the policies. It results that although we are not required formally to determine whether an action could have been sustained against the insurance company by either of these parties, yet the controversy between them cannot be determined except by ascertaining their legal or equitable rights to the amount due by the contract of insurance.

I have already intimated the difficulties in the way of an action to recover the insurance money by the heirs. On the other hand, it is said by the heirs that the administratrix could not have sustained such an action, because she had no interest in the property insured. It is unquestionable that the assured must have an insurable interest in the premises covered by the insurance at the time of the loss. But in the present case the title and interest in the lands, and with it the ownership of the building, passed to the heirs; yet, as we have seen, the right of action upon the contract vested in the administratrix. These parties are not strangers to each other, however, but both of them derive title from the intestate by a devolution or transfer, which is not only not forbidden but is recognized by the policy. The policy does not avoid the contract upon the transfer of the title to the property by descent to the heir, and the devolution of the right of action to the administratrix, but expressly preserves the right of action, and continues and extends the privileges of the agreement to the executors and administrators of the assured. An action may be brought upon the contract of insurance by the latter as the successor of the original party, and as named in the instrument itself, to recover damages for the destruction or injury of the interest of the former in the property insured. Thus the contract of insurance by the death of John R. Wyman became by its terms a contract with his administratrix for the protection of the interest of his heirs. So that the right of action became vested in one person, while the interest in the property insured, which was requisite to sustain the action, belonged to another. The administratrix would thus have sustained her action upon the policy as a person with whom a contract is made for the benefit of another. She would have been regarded as a party to whom, as a trustee of an express trust, the right to sue in her own name is preserved under the Code, § 118. The case would fall within the decision of Considerant v. Brisbane, 22 N. Y. 389. See Freeman v. Fulton Fire Insurance Company, 14 Abb. Prac. 404.

But it is difficult to reconcile the claim of the respondent to hold this insurance money, as part of the personal assets of the deceased, with this reasoning. The doctrine contended for by the appellant's counsel that not only the right of action, but the beneficial interest in the con-

tract with the insurers, passed to the administratrix at the death of John R. Wyman, fails when it is put to this test. She had no legal estate and no beneficial interest in the premises. The title to the contract, and to a recovery upon it, was vested in her by the operation of law, and not by express assignment or transfer. She is, of course, a trustee for creditors of the assets in her hands, but not of the lands of the deceased, nor of a contract like this, which is for the indemnity of those who have the beneficial interest in the lands. Upon the reason of the matter it is equally evident that the beneficial interest in such a contract of insurance belongs to the heir and not the personal representative of the deceased. The heir is the absolute owner of the property, entitled to its income and its enjoyment, and damnified by its destruction. He only can bring an action for any damage done to it after the title has passed to him from his ancestor. If the destruction of this building by fire had been the result of the malice or carelessness of another, the heirs of John R. Wyman would have had their action against such person and recovered damages for the very loss against which this contract is an indemnity. They could have destroyed, removed or sold the building at any time, and neither for such an act nor for any injury by a third person, could the administratrix have sued at all. Her rights rest upon the contract of the insurers exclusively; and that is a contract, as I have already said, not of guaranty against the destruction of the property, but of indemnity against a loss to the person injured by such destruction. It follows that it is a contract which, even if made or continued with her, is, in truth, for the benefit of the parties to whom that property belonged. The building which was burned was real estate. As such it vested in the heirs immediately upon the death of the intestate, and its subsequent injury by fire could not convert it into personal estate, so as to divest the right of the heirs or give a new direction or character to the money payable by way of indemnity for their loss.

Again, it was a part of the contract of insurance in this case, as is usual in policies of insurance against fire, that upon the destruction or injury of the property the insurers, if they chose, might repair or restore it in specie. If they had elected to take that course the expenditure which would thus have been made would, of course, have been entirely for the benefit of the heirs. The building repaired or replaced would have been theirs, because standing upon their lands. The theory of the payment of money in lieu of such actual reparation, is that the party is thus enabled to replace what has been destroyed for himself instead of its being done by the insurers. This is very plain in the case of a partial loss where there is only an injury and not a destruction of the premises insured, but it is equally so in all cases. It would be a singular result if the election of the insurers could determine whether the heirs or the administratrix should take the benefits of their contracts; whether they would make compensation in money to the latter, or in kind to the former. And it is a strong implication

from the existence of such a feature in the contract that its benefits must, in any event, and in either form of performance, inure to those who would, in the case of its literal performance, reap its fruits. My opinion is that in such a case as this the executor or administrator is a trustee for the heir who alone has been damnified, who has sustained the loss, and who is entitled to the indemnity.

It is supposed that such a construction of the contract and of the rights of the parties will be in conflict with the authorities. It is somewhat remarkable that so few cases can be found in which a question of such interest, and which must frequently arise, has been considered. An attentive examination of the few decisions to be found bearing upon the question, will show that they do not really contradict the views which have now been expressed. The difficulties which have been found, and are stated by text writers, grow out of the character of the question, and the peculiar relations of the parties to the subject, rather than from judicial decisions.[9] * * *

So far as we have thus considered the rights of these parties, and so far as their rights as against each other are concerned, the heirs-at-law are equitably entitled to this fund. If there had been no other allegations or proofs in the case, than such as we have thus far adverted to, the judgment of the Supreme Court would have been erroneous and must have been entirely reversed. The claim of the plaintiff to this fund as part of the ordinary personal assets of the deceased cannot be supported.

But there are other equities which it is necessary to consider. It was alleged and proved that the deceased died largely in debt and probably insolvent, and that the heirs were irresponsible. It was found by the judge who tried the cause that there was a judgment to a considerable amount against John R. Wyman, which was a lien upon his real estate, and was held by persons not parties to this suit. Although this insurance money is to be treated as proceeds of real estate, it is nevertheless subject, as is the real estate itself, under our laws, to the payment of the debts of the ancestor. A court having control of such funds should not allow them to pass into the hands of irresponsible and infant heirs, leaving the creditors of the deceased to pursue them by the dilatory remedy of a new and distinct proceeding. Having possession of the fund, it is proper to retain it for the purposes of a just administration among the parties entitled to it. It is usual, in cases where the proceeds of real estate come into the hands of the court, and it is shown that there are debts which the real estate was liable to pay, or to be sold in the hands of the heir to satisfy, to order the money paid over to the personal representative, for distribution so far as may be necessary, holding him to account for any balance or resulting residue to the heirs.

[9] The discussion of the cases is omitted.

The direction in the judgment appealed from in this case, that the money in the hands of Mr. Prosser should be paid to the administratrix, in order primarily to the payment of the debts of the deceased, need not therefore in fact be modified, except in a single particular. That particular is one of which the respondent alone in her individual capacity, and not the appellants, can complain. As the widow of John R. Wyman, she is entitled to a dower interest prior to the rights of his creditors in this fund. That should have been preserved by the judgment. It may be that any direction as to the ultimate disposition of the residue, after payment of the debts of the deceased, will be unimportant in this case. But the judgment taken with the complaint and the issue formed upon it by the answer, would imply, if not adjudge, that this money was regarded and ordered to be paid over by the court as part of the general personal estate, and should be distributed and accounted for as such. This was erroneous, and whether the error is of any practical importance to these parties or not, this also should be corrected. No account has indeed been taken of the estate, nor are we in a situation to dismiss the appellants from a right to call for such an account of this fund or of its ultimate disposition. Their right to do so should therefore be preserved.

The judgment should be modified so as to provide for the satisfaction of the dower interest of the widow in the moneys in question; for the payment of the surplus to her as the administratrix, to be applied by her in satisfaction of debts entitled to payment out of such assets in the order and manner established by law; and that the residue, if any, be divided among the heirs at law of the deceased according to their rights as such heirs. Neither party to have costs of their appeal.

Judgment modified, in accordance with above opinion.

BUEHLER v. GLONINGER.

(Supreme Court of Pennsylvania, 1834. 2 Watts, 226.)

Replevin by Peter Gloninger against Maria Buehler, William N. Irvine and Peter Keller. George Buehler purchased the goods for which the replevin was brought, and gave his notes for them, with Peter Gloninger, the plaintiff, and George Oves as his securities. The property, at the time of its purchase, was transferred by bill of sale to Gloninger and Oves as their security, but went into the possession of George Buehler, who agreed that Gloninger alone should hold that bill of sale, as a security also for a debt due to him. George Buehler died in the possession of the property, without having paid the debt due to Gloninger, and this replevin was brought against the defendants, who were his administrators, for the goods mentioned in

the bill of sale. The defendants, after having shown that they were administrators, [and] had given bond and filed an inventory of the goods of their intestate, offered to prove that George Buehler was insolvent, and that the value of these goods was necessary for the payment of his debts. This evidence was objected to by the plaintiff, and rejected; the court being of opinion that the Statute 13 Eliz. was not applicable so as to bar the plaintiff's recovery, and this was the assignment of error.

ROGERS, J. The attention of the court has been particularly directed to two errors on which the plaintiff in error mainly relies. First, the exclusion of evidence of the insolvency of Buehler the intestate; and secondly, that part of the charge which declares that the transfer of the property to the plaintiff and Oves, and to the plaintiff himself, was good against the defendants; and that they can make no defense that Buehler himself might not have made. The points depend upon the same principle, and may be considered together. There is no doubt that the statute of 13 Elizabeth only makes void a deed as against creditors, but not against the party himself, his executors or administrators; as against them it remains a good deed. Reichart v. Castator, 5 Bin. 109, 6 Am. Dec. 402; Killinger v. Reidenhauer, 6 Serg. & R. 531; Simon's Lessee v. Gibson, 1 Yeates, 291; Hartley's Lessee v. McAnulty, 4 Yeates, 95. And in Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252, it is decided, that when a person makes a fraudulent conveyance of his goods to another for the purpose of defeating his creditors, and dies intestate, the conveyance, though void as against creditors, is good against the intestate; and an action may be maintained against the administrator for the goods. The law is the same although the administrator may be a creditor of the fraudulent intestate.

Horner v. Leader, Cro. Jac. 270, Yelv. 196, which is cited and relied on in Osborne v. Moss, is to the same point. In Horner v. Leader, the intestate made a grant of his goods to B. to cheat his creditors, and he kept possession of the goods and died. B. then sued the administrator for the goods, and he pleaded this covin and fraud, and the statute of Elizabeth, which declares all such gifts and grants void as against creditors. The plaintiff replied that the defendant, the administrator, had assets in his hands to satisfy the debts demanded, and that the deed of gift was made upon good consideration, etc. It is true that the replication was withdrawn, but yet in neither of the cases cited did it appear that there was not sufficient assets to pay the debts. There being no averment that the estate was insolvent, the presumption was, that the administrators had assets in their hands sufficient to pay the debts; and if so, these decisions are in strict accordance with the general principle, about which there is no dispute. Inasmuch as we are to take it that the estate of Buehler is insolvent, this is substantially a contest between the fraudulent grantee and

the creditors of the fraudulent grantor, and as such, comes within the prohibition of the statute of 13 Elizabeth. The administrator is the trustee of the creditors, and in that capacity is bound to protect their interest. The personal representatives, in fact, have no interest in the controversy, as the case supposes that the assets are insufficient to pay the debts of the intestate.

Judgment reversed, and a venire de novo awarded.[10]

CUTTING v. TOWER.

(Supreme Judicial Court of Massachusetts, 1859. 14 Gray, 183.)

Action of tort for fraud and deceit in selling to the plaintiff's intestate eight bushels of damaged and poisoned corn meal, which caused the death of the intestate's horses when given to them as food.

At the trial in the superior court of Suffolk at March term, 1858, the defendants objected that this action did not by law survive to the plaintiff. Huntington, J., overruled the objection, the jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

BIGELOW, J. This case falls within the general rule that actions of tort do not survive. The exception created by Rev. St. c. 93, § 7, that actions for damage done to real or personal estate shall survive, was intended to include only those cases where injury is occasioned to property by the direct wrongful act of a party, and not where it results incidentally or collaterally therefrom, or from the doing of some other act, or the happening of some subsequent event over which the wrongdoer has no control. The gist of the action in the present case is the fraud and deceit practiced by the defendants on the plaintiff's intestate in the sale of merchandise. For this an action to recover damages would have laid in his favor whether the meal which he purchased had ever been used or not. It was not therefore the fraudulent representation of the defendants, which operated directly to the injury of any personal property. It was the use to which the meal was put, that caused the damage for which the plaintiff now seeks to recover. But that was not the act of the defendants. It was only a pecuniary loss resulting incidentally from the sale of the

[10] But see Estes v. Howland, 15 R. I. 127, 23 Atl. 624 (1885).

"It is true that, upon the subject of the right of the administrator to maintain an action for the recovery of property fraudulently transferred by his decedent, the decisions in other states are not uniform. The decisions have been much influenced by statutory provisions. Where the administrator is regarded as succeeding only to the rights of his decedent, a recovery has, of course, been denied. Where he is regarded as standing in the rights of creditors, also, it has been allowed. Here, in view of the insolvency of the estate and the provisions of the statute, the administrator asserts the rights of creditors." Shauck, J., in Doney v. Clark, 55 Ohio St. 294, 304, 45 N. E. 316, 317 (1896). Compare Lynch's Adm'r v. Murray, 81 Vt. 97, 69 Atl. 133 (1908).

meal. Suppose the meal, instead of being used by the plaintiff's intestate to feed his horses, had been made into bread for his family, and caused great sickness and suffering and loss of time to him and others. It would hardly be said that an action in such case would survive under St. 1842, c. 89, for damage to the person. The provisions of the statutes allowing actions of tort to survive have been strictly construed, so as not to extend the exceptions beyond the clear intent of the Legislature. Read v. Hatch, 19 Pick. 47; Nettleton v. Dinehart, 5 Cush. 543.

Exceptions sustained.[11]

DOBBS v. GULLIDGE.

(Supreme Court of North Carolina, 1838. 20 N. C. 197.)

This was an action of trespass quare clausum fregit, brought originally by William Dobbs, but during the pendency of the suit he died, and the present plaintiff, "the widow and devisee under the last will and testament of William Dobbs, came into court, and became party plaintiff." On the trial at Anson, before his honor, Judge Nash, on the last circuit, the plaintiff exhibited a clear title to the tract of land on which the trespass was committed, but she had no other possession than that which the law annexes to the title. The defendant was the owner of an adjoining tract, and about two years before the action was commenced, cleared a field of about two acres, fenced it in and cultivated it, and continued in the possession up to the time of the trial. At the time the defendant cleared the field, he declared that he did it with the view of taking possession. Upon this case the defend-

[11] In Jenks v. Hoag, 179 Mass. 583, 61 N. E. 221 (1901), where the court sustained a demurrer to a declaration by an administrator against the defendant where the declaration alleged that by subornation of perjury the defendant induced a court to believe that the defendant's client had no property applicable on an execution held by the intestate against the client, the court said: "It has been decided repeatedly that 'a mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate.' Leggate v. Moulton, 115 Mass. 552, and cases there cited. See, also, Cutter v. Hamlen, 147 Mass. 471 [18 N. E. 397, 1 L. R. A. 429]. The statute was intended to give a remedy which should survive only for injuries of a specific character 'to real or personal estate.'"

So under a statute making "actions of tort for assault, battery, imprisonment or other damage to the person" survive, the court said: "The words 'damage to the person,' as here used, do not, indeed, extend to torts not directly affecting the person, but only the feelings or reputation, such as breach of promise, slander, or malicious prosecution. Smith v. Sherman, 4 Cush. 408; Nettleton v. Dinehart, 5 Cush. 543. But they do include every action, the substantial cause of which is a bodily injury, or, in the words of Chief Justice Shaw, in 4 Cush. 413, 'damage of a physical character,' whether the connection between the cause and the effect is so close as to support an action of trespass, or so indirect as to require an action on the case at common law." Gray, J., in Norton v. Sewall, 106 Mass. 143–145, 8 Am. Rep. 298 (1870).

ant moved that the plaintiff should be nonsuited, on the ground that she ought to have brought an action of ejectment, and that trespass could not be maintained. His honor refused to nonsuit the plaintiff, but instructed the jury that the action was well brought; that as the defendant was a mere intruder without title, his possession extended only to the boundaries of his inclosures; that the plaintiff was not entitled in this action to any damages for the rents and use of the land within the fence of the defendant; but was entitled to damages for the entry on her land by the defendant. Under these instructions the plaintiff had a verdict and judgment, and the defendant appealed.

GASTON, J. The exception taken by the defendant to the charge of the judge is untenable. Trespass, being a remedy for an injury to the possession, cannot be maintained by him who had not possession when the wrong was done. But where there is no actual possession in another, the law adjudges him in possession who has the property. This possession, usually called with us constructive possession, is fully sufficient to maintain the action.

If there was no other objection to the judgment below it would be affirmed. But there is an error apparent on the record which the appellant insists upon, and on account of which the judgment must be reversed. William Dobbs, who instituted the action, died pending the suit, and thereupon "Penelope Dobbs, the widow and devisee under the last will and testament of William Dobbs, came into court and was made party plaintiff." At common law the action of trespass could not be maintained by or against representatives. By our act of 1799, c. 532, it is declared that the action of trespass "where property is in contest, and such action is not purely vindictive," together with certain other actions therein enumerated, shall not abate or be discontinued by the death of either party plaintiff or defendant, but the same shall and may be revived in the manner prescribed for the revival of other actions. The manner referred to is by an application to the court of the heirs, executors or administrators of the plaintiff, if *he* hath died, or by bringing into court the heirs, devisees, or executors or administrators of the defendant, if it be *his* death that renders a revival of the suit necessary. Whether the action is to be revived by or against heirs—or by or against the personal representatives—must depend upon the nature of the action. Trespass is purely a personal action sounding wholly in damages. A right to recover a recompense for damages sustained is a chose in action, which if permitted to survive the person damaged, survives to his executor or administrator.[12] The heir or devisee has no interest in or claim to it, and can not therefore either originally prosecute a suit for it, or revive one that has been instituted in the life of the person injured. McPherson v. Seguine, 14 N. C. 153.

[12] See Union Savings Bk. & Trust Co. v. Western Union Tel. Co., 78 Ohio St. 89, 86 N. E. 478, 128 Am. St. Rep. 675 (1908).

As a judgment has been erroneously rendered for the plaintiff below, when no judgment ought to have been rendered for either party, that judgment is reversed, and judgment on the verdict is arrested.

PER CURIAM. Judgment reversed.[13]

SECTION 2.—TIME WHEN TITLE VESTS

BRAZIER v. HUDSON.

(High Court of Chancery, 1836. 8 Sim. 67.)

A term for years was vested in one Hodgson. He died, having appointed his wife his executrix. She assigned the term to Baxter, and died without proving her husband's will. After her death letters of administration, limited as to the term, were taken out to Hodgson.

On the hearing of an exception to the master's report as to the title to the estate, one question was whether the administrator was the proper person to assign the term to a trustee for the purchaser.

THE VICE CHANCELLOR [Sir LANCELOT SHADWELL]. Lord Holt, in his judgment in Wankford v. Wankford, 1 Salk. 299, says that an act done by an executor is valid, provided the will is ultimately proved, although the executor who did the act died without proving the will. And I cannot but think that the convenience of mankind requires that all the acts of an executor that would be valid if probate had been taken, should be considered as valid if the will is ever afterwards proved. The consequence is that upon letters of administration to Hodgson, with his will annexed, being taken out, the assignment to Baxter will be established.

Exception allowed.

STAGG v. GREEN.

(Supreme Court of Missouri, 1871. 47 Mo. 500.)

BLISS, J. The petition charges that the defendant made his promissory note to the order of one Linnenfelser, deceased, who devised

[13] "In many, if not all, of the states of the United States, there are statutes that very much limit the application of the common-law rule as to the effect of the death of a party in actions ex delicto, so that it is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value diminishes.—survive and go to the executor or administrator as assets in his hands. And in some states statutory provision is made for the survival of actions of tort for injuries to the person." 1 Cyc. 52.

and bequeathed all his property to his wife Mary, and made her his sole executrix; that his will was duly probated, and his wife, as executrix, sold and indorsed said note to one Kifferer, who indorsed it to the plaintiff, who brings suit upon the note. Defendant demurs for the reason that plaintiff shows no title to the note; the said executrix not having qualified according to law, and having no right to dispose of it.

By the common law, the personal property of the testator vested in the executor, and he might, by virtue of the will, take immediate possession of it, dispose of it, and in almost every respect treat it as his own. He was not bound even to wait for its probate, although he could not appear in court until his right had been established by proof of the will.[14] The plaintiff bases his title to the note upon the right of the executrix, as such, to dispose of the personal property of the testator as recognized by the common law, and claims that she is not restrained therein by anything in the statute requiring bond and the taking out of letters.

The doctrine of the common law in this regard has not been adopted in most of the states. The executor here does not, as in England, derive his power solely from the will, but the law imposes certain obligations upon him before he is permitted to execute it. The fact that one is named in the will as executor does not, as at common law, make him executor in fact, but only gives him the legal right to become executor upon complying with the conditions required by law. The statute of our state expressly requires two things of one named as executor before letters can issue to him: First, that he take the oath (section 16); and second, that he give bond (section 19). And assuming that the latter requirement is imperative, section 11 forbids any one from intermeddling with the estate except those who give bond, in case more than one person is named in the will.

This question has not been directly before this court, but the view above taken has been everywhere assumed or taken for granted. No executor has ever been recognized as such who has not qualified according to law. The courts of other states, however, have directly passed upon it. In Monroe, Ex'r of Jones, v. James, 4 Munf. (Va.) 194, a person named as executor had sold a slave before he had qualified as such. The other executor named afterward qualified and sued for and recovered the slave. The whole question was fully consid-

[14] "An executor may at law bring an action before probate, but cannot declare till the will is actually proved, and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill here till after probate." Lord Hardwicke, C., in Mitchell v. Smart, 3 Atk. 606 (1747). See, however, 1 Daniell's Ch. Pl. & Pr. (6th Am. Ed.) *318, that "if an executor, before probate, files a bill, alleging that he has proved the will, such allegation will obviate a demurrer. He must, however, prove the will before the hearing of the cause, and then the probate will be sufficient to support the bill, although it bears date subsequently to the filing of it."

ered by the court, and the doctrine of the common law acknowledged; but inasmuch as the statute of Virginia required that executors should give bond, the court held that they were not authorized to dispose of the personal property until they had done so. See, also, upon the same point Carpenter v. Goring, 20 Ala. 587. In Stearns v. Burnham, 5 Me. 261, 17 Am. Dec. 228, the testator had been a resident of Massachusetts and held a note made by a citizen of Maine. His executrix, who duly qualified to act as such under the law of Massachusetts, indorsed the note to the plaintiff, who brought suit as indorsee. The court held that she could give him thereby no power to sue; that she derived her authority from the laws of Massachusetts, which had no extra-territorial force; that she could not sue in Maine herself without qualifying according to its laws; nor could she so pass title in the paper as to authorize another to do so. The contrary seems to be held upon the main question in Harper v. Butler, 2 Pet. 239, 7 L. Ed. 410, where the assignee of an executor was permitted to recover in Mississippi upon an assignment made in Kentucky; but the right of the executor to act in the latter state was conceded, he having there duly qualified as executor. See, also, Rand, Adm'r, v. Hubbard et al., 4 Metc. (Mass.) 252.

Counsel insist that the authorities in Virginia and other states cannot apply to Missouri because of the different provisions in their statutes; that in those states the executor is absolutely prohibited from acting without giving bond, etc. When the above case of Monroe v. James was decided, the statute then in force provided that a failure to give security should amount to a refusal to act. Our statute (section 10) provides that after probate of any will, letters testamentary shall be granted to the persons therein appointed executors. But such letters cannot be granted unless they qualify by giving bond, etc. If the executor named shall refuse to act, then letters shall be granted to others. By necessary implication he is prohibited from acting as plainly as though the prohibition were direct. I can have no doubt that under our laws the executor, by virtue of being so named, has no power to intermeddle with the estate except under pressing necessity, and only so far as is necessary, until letters have been obtained, although if he shall so intermeddle and shall subsequently qualify, his letters will relate back and cover his former acts. 2 Redf. Wills, 13, 16, § 2.

The policy of the law is obvious. The executor is but a trustee; he receives nothing in his own right, but everything for the use of others. Before assuming the relation, before he is permitted to take possession of and dispose of property thus intrusted to him, he is required to give ample security for the benefit of those for whom he acts. If he were permitted to first dispose of the property, whether chattels or choses in action, the whole purpose of the law might be defeated. Creditors and legatees might be defrauded, and, if the executor were not re-

sponsible, would be without remedy. There is no security to them but to hold him absolutely disqualified to act until he has complied with the requirements of the statute.

The judgment will be affirmed. The other Judges concur.[15]

WELCHMAN v. STURGIS.

(Court of Queen's Bench, 1849. 13 Q. B. 552.)

Indebitatus assumpsit by plaintiff as administratrix. First count, for money had and received to her use as administratrix. Second count, on an account stated with her as administratrix. Plea: Non assumpsit.

On the trial, before Platt, B., at the last Monmouthshire spring assizes, it appeared that the defendant had lived as housekeeper with the intestate since his separation from his wife, the present plaintiff, and had, after his death in May, 1848, and before the taking out of letters of administration by the plaintiff in June of the same year, applied, in payment of the funeral and other expenses, the cash that was in the house at the time of intestate's death, as well as divers sums of money arising from the sale of his effects, and also certain cash payments made to defendant after intestate's death by parties indebted to him. For the recovery of this money the present action was brought. The defendant's counsel contended that the plaintiff could not recover in this action, inasmuch as the money claimed had been received by the defendant, and paid away by her, before the grant of administration to the plaintiff, and the property of the intestate did not vest in plaintiff before such grant. The learned judge overruled the objection, and a verdict was found for the plaintiff on the first count, and for the defendant on the second.

Keating, for the defendant, now moved for a new trial on the ground of misdirection.

PATTESON, J.[16] I think we should allow of no doubt that the administratrix in this case is entitled by relation to sue the defendant for

[15] "At death a man's estate really passes into the hands of the law for administration, as much when he dies testate as when intestate; except that, in the former case, he fixes the law of its distribution after payment of debts and usually appoints the persons who are to execute his will. But even this appointment is only provisional, and required to be approved by the law before it is complete; and therefore the title to the office of executor is derived rather from the law than from the will. The law, however, allows a man to appoint his executors, subject to this approval and treats them, when appointed, as entitled to the office until they renounce it, if they are not legally incompetent to fill it." Lowrie, J., in Shoenberger's Ex'rs v. Lancaster Savings Institution, 28 Pa. 459, 466 (1857). See, also, Chadwick v. Stilphen, 105 Me. 242, 74 Atl. 50 (1909). See 1 Woerner's American Law of Administration (2d Ed.) § 172.

[16] The decision on an incidental point given in the report following this opinion is omitted.

money had and received to her use. There are express decisions to show that she could have sued in trespass or trover, for a trespass or a tortious conversion of the same date. Now, as regards the money produced by the sale of the effects, there having been no affirmance of such sale by the plaintiff, she is in a position to bring an action of trover; she may also waive the tort, and bring an action on contract. With respect to the money due to the intestate, and received by the defendant, it is true that no privity existed between her and the plaintiff; but, as such money is due to the administratrix by relation, she may affirm the receiving, and sue for the money as had and received to her use. In Foster v. Bates, 12 M. & W. 226, the court said: "There is no occasion to have recourse to the doctrine, that one may waive a tort and recover on a contract;" but in the present case that doctrine must be applied; and, the letters of administration relating back, the administratrix may elect to treat the money as received to her use.

ERLE, J. With respect to the goods sold by the defendant, the case of Fyson v. Chambers, 9 M. & W. 460, is another authority to show that the plaintiff has a right to sue: and I do not think that any distinction can be drawn, as regards the relation back of the letters of administration, between goods and money specifically belonging to the intestate, or due to him, at the time of his death.

Rule refused.[17]

GILKEY v. HAMILTON.

(Supreme Court of Michigan, 1871. 22 Mich. 283.)

The plaintiffs below, as administrators of the estate of Harvey Hamilton, brought their action in the circuit court of the county of Kalamazoo against Edward Gilkey, of replevin for a horse, which belonged to their intestate at the time of his death. The plaintiffs, who are respectively the son and wife of Harvey Hamilton, subsequent to the death of Hamilton and prior to the issuing of letters of administration to them, had delivered the horse to an agent with instructions to sell or dispose of him. Under these instructions the agent transferred the horse to defendant Gilkey, who claimed that the transaction was a valid sale, and refused to deliver the horse to the plaintiffs when demanded by them after they had received their letters of ad-

[17] The title of an administrator to the goods of the intestate takes effect by relation from the intestate's death for the purpose of enabling the administrator to maintain trover for a conversion after the intestate's death and before administration granted. See Babcock v. Booth, 2 Hill (N. Y.) 181, 38 Am. Dec. 578 (1842). See, also, Hathorn v. Eaton, 70 Me. 219 (1879), and Dunphy v. Callahan, 126 App. Div. 11, 110 N. Y. Supp. 179 (1908), which, however, were cases of an executor. And see 38 Am. Dec. 583, note. In a proper case the tort may be waived and an action brought on the quasi contract. Heber v. Heber's Estate, 139 Wis. 472, 121 N. W. 328 (1909). See, also, Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073 (1905). On the rule where no administration is had, see cases on the necessity and effect of probate, ante, pp. 514-520.

ministration. On the trial the court excluded all evidence of the instructions by the plaintiffs relative to the sale or transfer of the horse, prior to their appointment as administrators; and, under the charge of the court, they had a verdict and judgment, which the defendant, Gilkey, brings into this court for review.

COOLEY, J. This case presents the question whether, where one interferes with the property of a deceased person and sells a portion thereof without right, and is afterwards appointed administrator on the estate of such deceased person, he will be estopped by his prior acts from recovering the property for the estate.

The plaintiff in error insists that he is; and he calls our attention to a considerable list of judicial decisions in which it has been held, that when one is appointed administrator on the estate of a deceased person, his title relates back to, and takes effect from, the date of the death of the intestate. And the inference he deduces from these cases is, that the legal effect of whatever is done by the person thus appointed intermediate the death of the intestate and his own appointment, is precisely the same as though he had held letters of administration at that time.

The doctrine of relation is a familiar and important one, and, indeed, is quite necessary to the protection of the interests of the estate. But this necessity is the reason upon which it rests, and it is no part of its purpose to legalize lawless acts which may, and generally would, work the estate a prejudice.

Under our probate system, an administrator is a mere officer of the law, who has title to the assets for the purpose of collecting and disposing of the same for the benefit of creditors and the next of kin. When he receives his letters, his title is correctly said to relate back to the death of the intestate; but it is an official title, and his being clothed with it cannot make good the prior acts which he has not assumed to do officially, but in a different capacity from that in which he is now acting. One man appointed administrator cannot have less power than any other man would have had if he had received the same appointment; the force and effect of his letters cannot be limited and restrained by his previous acts in his private character, any more than the official authority of a sheriff or any other public officer can be limited and restrained by what he may have done as an individual previous to his election. On his appointment, the administrator becomes vested officially, and for the purposes of the trust, with all such title as his intestate had to the personalty at his death; and he is neither obliged to, nor has he the right to, recognize, validate, and bind the estate by the unauthorized acts which have been done to the prejudice of the estate by any one while the title was in abeyance.

The doctrine of executor de son tort is alluded to as having some bearing, but it is a doctrine not permissible in our system. Our law looks to the interest of the estate, and employs the administrator as a mere instrument to guard, defend, and advance that interest. To

apply the doctrine of estoppel as between the administrator and one whom, as an individual, he may have dealt with improperly, would be to treat the administrator as more important than the estate—the agent as more important than the principal—the instrument as more to be regarded than the object to accomplish which the instrument is created. In truth, the administrator is merely the representative of the estate; the estate, in his person, is the party to the contracts he makes and the suits he brings; and to make the doctrine of estoppel applicable, it must be shown that the equities it rests upon are equities against the estate. But certainly there is nothing in the fact that a man is appointed administrator, who has previously misconducted himself, which can justly raise against the estate any equities, or which can justly deprive the creditors or next of kin of any of their rights in its assets.

We do not deem it necessary to examine this subject in detail, because we regard the previous decisions in Cullen v. O'Hara, 4 Mich. 138, and Morton v. Preston, 18 Mich. 71, 100 Am. Dec. 146, as conclusive upon it; and we have only alluded in very general terms to what seem to us the obvious reasons on which those cases rest.

The judgment must be affirmed, with costs. The other justices concurred.[18]

SECTION 3.—DEBTS DUE FROM THE PERSONAL REPRESENTATIVE AS ASSETS

LYON v. OSGOOD et al.

(Supreme Court of Vermont, 1886. 58 Vt. 707, 7 Atl. 5.)

Bill in equity by surety on executor's bond to be relieved from liability on account of insolvency of executor, who had charged his debt to testator as assets.

WALKER, J.[19] The administration bond, which was executed by Daniel R. Osgood as principal, and Thomas J. Lyon, the orator, as surety, to the probate court upon Osgood's appointment as executor of the will of Alexander Barton, was in the usual form, and conditioned for the executor's inventorying and accounting for all the assets of said Barton's estate, and for the faithful performance of his trust as such executor. From the master's report it appears that the estate was inventoried and appraised at $9,935.82, which sum was made up of personal property appraised at $427, and a note which Osgood was

[18] But see Alvord v. Marsh, 12 Allen (Mass.) 603 (1866), where the court held that letters of administration relate back to the death of the intestate and legalize "receipts of property by the administrator for which he would otherwise have been responsible as executor de son tort."

[19] The statement of facts and part of the opinion are omitted.

owing the testator, dated September 30, 1873, on which there was due, at the time of appraisal, March 10, 1877, the sum of $9,508.82. On the eighth day of January, 1878, Osgood, after due publication of notice for that purpose, rendered his administration account to the probate court, charging himself with the inventory, $9,935.82, and crediting himself with sundry disbursements, amounting to $523.41, and with $250 paid on legacies to Charles, Cleora, and Abigail, making $773.41, leaving an apparent balance in his hands of $9,162.41, as to which final decree of distribution was made on the same day according to the provisions of the will, and from which no appeal was taken. In making the payments allowed in his account, Osgood paid of his own funds $346.41, which should be treated as a payment on his note.

The orator had no knowledge of this settlement until suit was brought against him on the bond. It also appears from the master's report that Osgood, at the time of his appointment and at the time of rendering his administration account, was not solvent; that his whole property did not exceed in value the sum of $4,300 when appointed, and that his financial condition had not improved at the time of rendering his account; and that, with the exception of $331 paid to the legatees Charles, Cleora, and Abigail, in 1879 and in 1881, he has used in the support of his family, and lost in unfortunate business ventures, all his property, and is now worthless. * * *

The ground of the orator's complaint is that the executor's accounting to the probate court for the whole amount of his indebtedness to the estate as assets in his hands, when in fact its collectible value was less than one-half the amount due thereon, was a fraud upon him, and does him great injustice.

The orator was not a party to the accounting, nor was he necessarily so. His liability to pay attaches on the failure of the executor to pay the legatees according to the decree of the court, and his right to defend against the decree for fraud or mistake is not barred by the action of the probate court. The decree is undoubtedly conclusive against the surety, unless it works a fraud upon him.

If he has been defrauded by the accounting or decree, his remedy is in the court of chancery, where the peculiar rights of sureties originated, and have always been considered, and which always interposes to relieve against fraud, and prevent gross injustice. If the executor had charged himself in the accounting with $1,000 which were not assets of the estate, and the probate court had made distribution thereof to the legatees, and they had brought suit at law upon the executor's bond to enforce the decree against the surety upon default of his principal, it would not be contended that the court of chancery had not jurisdiction to give the surety relief against such a fraudulent decree. Such is the ground of the orator's complaint here; and we think, upon principle and authority, the court of chancery has jurisdiction. Ordinary v. Kershaw, 14 N. J. Eq. 527.

The orator insists that he should be absolved from all liability upon the bond for any decree of the probate court awarding any sum to the executor or his heirs, and to Lydia Osgood, his wife, and also from all liability to the other legatees, Charles, Cleora, and Abigail, and their heirs, except such portions of their legacies as have been paid on the note, or of the collectible value of it, which has been ascertained by the master to be $4,300.

It is contended by the defendants, answering, that, when Osgood was appointed executor of his creditor's will, he became thereby liable to account for his indebtedness to the estate in his administration account, and the surety on his administration bond also became responsible for such indebtedness; that is, that the appointment of the debtor as such executor, whether solvent or insolvent, operated as a payment of the whole debt to the executor as actual money assets of the estate. Where the executor is solvent, there is no question but that the rule contended for by the defendants is the true one, and the surety would be holden for the whole debt, because the executor had the means wherewith to pay and discharge the debt. This was held to be the law in Probate Court v. Merriam, 8 Vt. 234, wherein the court held it was the duty of a solvent executor or administrator to inventory and account for any notes or obligations which the deceased held against him, and which were due and payable;* and that his surety on his bond was liable for his default therein.

This rule of treating the debt as paid to the executor rests wholly on technical grounds, and should not be extended so as to work injustice. While, upon the ground of policy, it may be well to hold that the executor is estopped from showing he cannot collect his own debt, and that his debt should be treated as paid to him in his representative capacity because he cannot sue himself, yet such estoppel should not be used as a fact from which the ability of the executor to pay his debt must be inferred, or as establishing the fact of actual money assets of the estate in his hands to the amount of the debt for which the surety must stand responsible. Chief Justice Shaw, in Kinney v. Ensign, 18 Pick. (Mass.) 232, says: "The holding the fact of a debtor taking administration upon the estate of his creditor to be a payment may be deemed a legal fiction, adopted for the purposes of justice and convenience, as well as from considerations of policy, and calculated generally to promote justice; but such legal fiction will never be allowed to go so far as to work wrong and injustice."

Although debts of every description due to the testator are assets, yet the executor is not to be charged with them until he has received the money. 2 Williams, Ex'rs, 1022. The general rule with respect to what shall be assets in the hands of an executor to charge him is all those goods and chattels, actions and commodities, etc., which were of the deceased in right of action or possession, and which, after his

* For his analogous duty to retain his share of the estate for his own debts to the estate, see 6 Am. & Eng. Ann. Cas. 810, note.

death, the executor gets into his hands as duly belonging to him in right of his executorship, and nothing else shall be said to be assets in the hands of the executor to make him chargeable. 2 Williams, Ex'rs, 1012; Touch. 496.

If the executor is not chargeable with the debts as assets until he has received the money thereon, when not guilty of laches he should not be held chargeable, as regards the liability of his surety, for his own indebtedness beyond his actual means or ability to pay; for only to that extent does he, by his appointment, receive money from himself belonging to the estate. His ability to pay his indebtedness is the extent of the assets in his hands upon his obligation to the deceased. The surety, by signing the administration bond, has aided him to get possession of assets from his indebtedness only to the extent of his ability to pay it; and he should not be held liable for a greater sum on each indebtedness, unless the executor, after his appointment, becomes able to meet and discharge a greater sum.

The executor's bond is conditioned for the faithful administration of the assets, and a faithful performance of the duties of the trust; and the surety should be held chargeable only according to the terms of the bond for the default of his principal. If, at the time the surety assumes responsibility, the executor is able to pay his debt to the estate, or afterwards, during the settlement of the estate, he becomes able to pay it, the surety is responsible for it as assets. The executor's failure to account for his debt, when he has the power and means to pay it, is a gross violation of his duty. It cannot be held to be a breach of trust for the executor not to do what is beyond his power and control to perform, when free from laches. Where the executor holds a note in favor of the testator against any other person than himself, which is uncollectible, he is not charged with it in his administration account. Upon what principle should there be a distinction made in the degree of fidelity required as to a worthless obligation which the deceased held against his executor, so far as relates to the surety's liability? The law, to secure fidelity and faithful administration of assets, wisely requires a bond with ample sureties for the faithful performance of the trust, and makes the surety responsible for any failure of the executor's fidelity. If the inability to collect a note against another is not a breach of duty, why should the inability of the executor to pay his own indebtedness work a breach of trust, and bring responsibility upon his surety beyond the executor's actual means to meet his debt? Both debts were the unfortunate investments of the deceased in his life-time, and both should be governed by the same rule in measuring the responsibility of the surety. There is no more ground, under the terms of the bond, for compelling the surety to make the worthless debt of the one good than the other.

The extension of the legal fiction of payment so as to make the surety liable for the executor's debt beyond his means to pay, when not guilty of laches, would often work great injustice to the surety.

The surety ought not to be required to contribute from his own funds to make up an estate for the deceased which he in fact was not possessed of at the time of his death. It is true the executor is bound to use vigilance and diligence in pursuing and collecting all claims due the estate, and any unnecessary delay which results in the loss of a claim against another person, or in the loss of his own indebtedness, is a violation of his duty, for which the surety is responsible; but, in the absence of laches, we think the surety is liable upon his bond for the executor's debt only to the extent of the executor's ability to pay it. When the executor is unable to pay his debt, it is his duty, in rendering his administration account, to claim credit for his lack of means to pay his debt, for the protection of his surety, and on his failure to do so relief will be granted by the proper tribunal. Garber v. Com., 7 Pa. 265; In re Piper's Estate, 15 Pa. 533; Gottsberger v. Smith, 5 Duer (N. Y.) 566.

In Harker v. Irick, 10 N. J. Eq. 269, Chancellor Williamson, in his opinion, says: "If a person become surety for one as administrator, who at the time is a debtor to the estate, and is insolvent, and is never able to discharge such indebtedness, such surety is not bound for such a delinquency of his principal. He is only bound for the faithful performance of his duties as administrator. If, under such circumstances, the administrator should, in the settlement of his account with the court, charge himself with the debt, and the account should be passed in such a shape as to bind the surety for the debt, the surety would be relieved, upon application to the proper tribunal, from such responsibility. It would be fraud upon the surety to exact the debt from him, whether the administrator did or did not contemplate a fraud."

We think the orator's liability as surety upon Osgood's executor's bond rests upon the rule herein laid down, supported by the decisions of the courts cited. At the time the orator assumed responsibility as surety, Osgood had property to the amount of only $4,300 which he could have applied towards the extinguishment of his indebtedness to the estate. He had no more when he rendered his administration account, and has not since had. The executor should have been credited in his account with the excess of his indebtedness above $4,300. This would have shown the amount of actual assets in his hands for distribution to be $3,953.59, for which the orator, as surety, was responsible to the general legatees, excepting Osgood, whose legacy would have been properly canceled by a corresponding amount of the worthless part of his indebtedness. * * *

Cause remanded, with a mandate that a decree be entered for the orator, according to the prayer of the bill, against Osgood and wife, and that the bill be dismissed as to the other defendants, with costs.[20]

[20] But see Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205, 100 Am. St. Rep. 552 (1903). For the authorities pro and contra, see 112 Am. St.

SECTION 4.—THE POWER OF ALIENATION [21]

CARTER v. MANUFACTURERS' NAT. BANK OF LEWISTON.

(Supreme Judicial Court of Maine, 1880. 71 Me. 448, 36 Am. Rep. 338.)

An action by an administrator de bonis non against the Manufacturers' National Bank of Lewiston for the conversion of shares belonging to the decedent, transferred on the books of the bank to "John G. Cook, Executor." The executor borrowed from the bank on his note, giving the stock as security. The money was loaned by the bank on the statement of the executor that it was required in the settlement of the estate.

VIRGIN, J. The main question is whether the bank obtained a valid title to the shares of stock pledged to it by the executor as collateral security for the payment of his note.

The interest which an executor as such has in the personal estate of his testator is not the absolute title of an owner, else it might be levied on for his personal debts; but he holds in autre droit, as the minister and dispenser of the goods of the dead. Went. Off. Ex'r (14th Ed.) 196; Pinchon's Case, 9 Coke, 86b; Dalton v. Dalton, 51 Me. 171; Weeks v. Gibbs, 9 Mass. 76; Hutchins v. State Bank, 12 Metc. (Mass.) 423. As soon as he is clothed with a commission from the probate court, the executor is vested with the title to all the personal effects which the testator possessed at the instant of his decease; but the title is fiduciary and not beneficial (Petersen v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298), and his office is not that of an agent, but of a trustee. Dalton v. Dalton, supra; Sumner v. Williams, 8 Mass. 198, 5 Am. Dec. 83; Shirley v. Healds, 34 N. H. 407.

As a necessary incident to the execution of the will and the administration of the estate, the power to dispose of the personal estate is given to the executor. And no general proposition of law is better established than that an executor has an absolute control over all the personal effects of his testator. Petersen v. Chemical Bank, supra; 1 Williams, Ex'rs (6th Am. Ed.) 709; 2 Williams, Ex'rs, 998; 1 Perry, Trusts, § 225, and cases in notes. And this rule prevails where no statute intervenes. Rev. St. c. 64, § 49.

Rep. 406, note. See, also, Wachsmuth v. Penn Mutual, 241 Ill. 409, 89 N. E. 787 (1909).

In In the Matter of Ablowich, 118 App. Div. 626, 103 N. Y. Supp. 699 (1907), an administrator was charged with the indebtedness of his firm to the estate, although his letters were revoked and the firm obligations were turned over to and accepted by his successor.

[21] On the common-law power of executors and administrators over personal estate, see 78 Am. St. Rep. 179–183, note, 192–196, note. On the authority of one of several executors or administrators, see 127 Am. St. Rep. 381, note.

While it is the duty of an executor to use reasonable diligence in converting assets into money for the general purposes of the will, the law permits him to exercise a sound discretion as to the time, within a limited period, when he will sell. And high authority has declared that circumstances may exist in which it is certainly not wrong in him, although it may not be a positive duty, to make advances for the benefit of the estate and reimburse himself therefrom. Munroe v. Holmes, 13 Allen, 110. If he may advance his own money for the general purposes of the will, and may sell the personal effects for the like object, it is difficult to see why, in the absence of any prohibitory provision in the will, he may not mortgage or pledge the assets for the same purpose; and the great weight of authority so holds. 2 Williams, Ex'rs, 1001, and cases cited; McLeod v. Drummond, 17 Ves. 154; Andrew v. Wrigley, 4 Brown, Ch. 125.

In Earl Vane v. Rigden, 5 Ch. App. 663, Lord Hatherly said: "Lord Thurlow expressed his opinion clearly to be that the executor is at liberty either to sell or pledge the assets of the testator. Scott v. Tyler, 2 Dickens, 712, 725. In fact, he has complete and absolute control over the property, and it is for the safety of mankind that it should be so; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor." And Sir W. M. James, in the same case, said: "It seems to be settled on principle, as well as by authority, that an executor has full right to mortgage as well as sell; and it would be inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done." See, also, 3 Redf. Wills, c. 8, § 32, pl. 4 et seq.

In considering the question whether an executor had followed a specific power in a will, Chancellor Buchner made the general remark: "It is certain that an executor, as such, has no power to pledge the estate of his testator for a loan of money." Ford v. Russell, Freem. Ch. (Miss.) 42. If the learned chancellor meant that an executor has no authority to pledge the assets of his testator for a contemporaneous advance of money for the use of the estate—for a purpose connected with the administration of the assets—he is not sustained by the great current of modern authority. 1 Perry, Trusts, 270, and cases there cited, and cases supra.

Although the general proposition mentioned is so well established, nevertheless, like most others, it is not without an exception; for while it is of the greatest importance that the disposal of a testator's effects should be made reasonably safe to the purchaser, still it is the bounden duty of the executor to faithfully appropriate the assets to the due execution of the will; and a misapplication thereof is a breach of duty for which he is liable. And all the authorities concur in holding that, if the purchaser, mortgagee, or pledgee know or have notice

that the transfer to him is made for the purpose of misapplying the assets, his title cannot be upheld, and he thereby becomes involved, and is made liable to all persons beneficially interested in the will, except the executor. 2 Williams, Ex'rs, 1002, and cases in note X; 1 Perry, Trusts, 270, and cases in note 1; 1 Story, Eq. Jur. §§ 400, 402, and cases; McLeod v. Drummond, 17 Ves. 153, where the cases are critically reviewed by Lord Elden; Collinson v. Lister, 7 De Gex, M. & G. 633; Yerger v. Jones, 16 How. 30, 37, 38, 14 L. Ed. 832; Hutchins v. State Bank, supra.

It also now seems to be well settled, in equity at least, that an executor can make no valid sale or pledge of his testator's effects for the payment or security of his own private debt (2 Sugd. Vend. 372, and cases in note "o"; 1 Perry, Trusts, 270, and cases in note 3; 2 Williams, Ex'rs, 1004, and cases in note "d"), on the ground res ipsa loquitur, giving the purchaser, mortgagee, or pledgee such notice of the misapplication as necessarily to involve him in the breach of duty.

Chancellor Kent concludes a critical examination of the cases which had then been decided as follows: "I have thus looked pretty fully into the decisions of a purchaser from an executor of the testator's assets, and they all agree in this: that the purchaser is safe if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction applying them to the extinguishment of his own private debt. The great difficulty has been to determine how far the purchaser dealt at his peril, when he knew from the very face of the proceeding that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and better doctrine is that in such a case he does buy at his peril, but that, if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry, and he may safely repose on the general presumption that the executor is in the due execution of his trust." Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 160, 11 Am. Dec. 441.

So Chief Judge Taney said: "An executor may sell or raise money on the property of the deceased, in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. * * * But it is equally clear that if a party dealing with an executor has at the time reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured." Lowry v. Commercial & Farmers' Bank, Taney, 310, 330, Fed. Cas. 8,581.

The law recognizes a distinction between an ordinary trustee and an executor. The former has possession for custody, and the latter for administration. The latter has a necessary incidental power of disposal which the former does not; and, as a consequence, when one purchases of the latter stocks or other securities bearing on their face

the revelation of a trust, he may do so safely in the absence of notice or knowledge of any intended breach of trust on the part of the executor; but, if he purchases like trust property of an ordinary trustee, the law imposes upon him the duty of inquiring into the right of the trustee to change the securities. Duncan v. Jaudon, 15 Wall. 165, 175, 21 L. Ed. 142; Shaw v. Spencer, 100 Mass. 388, 97 Am. Dec. 107, 1 Am. Rep. 115; Pendleton v. Fay, 2 Paige (N. Y.) 205; Atkinson v. Atkinson, 8 Allen (Mass.) 15; 1 Perry, Trusts, § 225, p. 271.

In the case at bar the certificate of stock was changed by the corporation, and issued to Cook, executor, thus revealing to the bank the trust. But this alone would not imperil the bank in the transaction, for the executor had the presumptive right to sell or pledge the stock. But the executor gave to the bank his note, for the security of which the pledge was made. The note could not be collected against the estate, for it was the personal note of the executor. Davis v. French, 20 Me. 21, 37 Am. Dec. 36. He could not create a debt in that manner against the estate. And if the money was thereby procured for his own private use, and the bank knew it at the time, the transfer of the stock would be a devastavit, and could not be upheld. If the note had been given to the bank for a private debt due to the bank from the executor, created before or during his executorship, but independent thereof, it would come within the principle of the numerous cases before cited, where the transaction itself would speak, and conclude the bank. But, if given as a voucher for money obtained for a legitimate purpose connected with a bona fide administration of the will, then, though the executor alone was made liable for its payment, the transaction would be legitimate, and the estate would have no reason for complaint. The case finds "that the money was loaned in good faith by the bank, and upon the statement made by Cook that the same was wanted in the settlement of the estate." The presumption is that he was acting faithfully. There is no evidence to the contrary, and the presumption must stand. The doctrine of this case is recognized in Pettingill v. Pettingill, 60 Me. 412, 425.

Plaintiff nonsuit.[22]

[22] See Lyman v. National Bank of the Republic, 181 Mass. 437, 63 N. E. 923 (1902); Hemmy v. Hawkins, 102 Wis. 56, 78 N. W. 177, 72 Am. St. Rep. 863 (1899).

"It is a general rule of law and equity that an executor has an absolute power of disposal over the personal effects of his testator, and they cannot be followed by creditors nor legatees into the hands of the alienee. This results from the fact that in many instances the executor must sell in order to perform his duty in paying debts, etc.; and no one would deal with him if liable afterwards to be called to an account. Coexecutors are regarded in law as an individual person; and the acts of any one of them in respect to the administration of the effects, are deemed to be the acts of all; as where one releases a debt or settles an account of a person with the deceased, or surrenders a term, or sells the goods and chattels of the estate, his act binds the others. An exception to this general power will be found in those cases only when collusions exist between the executor and purchaser. That the executor may waste the money is not alone sufficient to invalidate the sale; it must

HILL v. SIMPSON.

(High Court of Chancery, 1802. 7 Ves. 152.)

John Smith by his will, dated the 18th of January, 1785, among other legacies, gave to Jane Pearson the sum of £200 to be paid to her immediately, or as soon as possible on the death or marriage of his wife Elizabeth Smith; and he left Charles Rushworth £50, to be paid at the death of his said wife; and he appointed John Lush and his said wife Elizabeth Smith, executors. The testator died on the 23d of May, 1785; and his widow and Lush proved the will. Lush died on the 26th of January, 1796; and on his death, Elizabeth Smith possessed herself of all the personal estate of her late husband.

Elizabeth Smith by her will, made in 1790, directed all her debts, funeral expenses, and the expenses of the executors, to be paid; and, subject thereto and to her late husband's will, she gave, devised, and bequeathed, all and every the moneys, real and personal estates, securities for money, goods, chattels, and all other her estate and effects, to her nephews Joseph Simpson, William Thorley, and Henry Wright, and to the survivors and survivor of them, their and his executors and administrators; upon trust to convey the freehold property, consisting of two messuages, to her two nephews John Simpson and James Simpson; with remainder over to Joseph Simpson; and after giving some legacies she appointed Joseph Simpson, Thorley, and Wright, her executors.

Elizabeth Smith died on the 5th of April, 1797; leaving Joseph Simpson her heir at law; who alone proved her will; and possessed himself of her real and personal estates, and of part of the personal estate of John Smith. At her death there were standing in the name of John Smith in the books of the Bank of England £50 five per cent. navy annuities; £275 four per cent. consolidated annuities; £60 short annuities; and £550 three per cent. reduced annuities; which funds Simpson transferred to Moffatt & Co., his bankers, as a security for such sums as he then owed, or might afterwards owe them. In 1798 a commission of bankruptcy issued against him.

further appear that the purchaser participated in the devastavit or breach of duty in the executor. * * * 'The executor has the right to sell and transfer and one who buys of him in good faith, and pays in money the price agreed upon, is not responsible for the application of the purchase money.' Per Hunt, J., Leitch et al. v. Wells et al., 48 N. Y. 585. Letters of administration are always sufficient evidence of authority to transfer, because a sale and transfer of stock is in the line of the duty of an administrator. * * * The law casts no duty upon a purchaser to ascertain if the trusted executor of the decedent's will is mismanaging the estate in fraud of creditors or legatees.' Trunkey, J., in Wood's Appeal, 92 Pa. 379, 391–393, 37 Am. Rep. 694 (1880).

On the validity of an alienation by an executor de son tort, see 1 Woerner's Am. Law of Admin. (2d Ed.) *426, 427, § 197.

On the power of an executor to sell under a will after his discharge, see Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623 (1905). See, also, 2 L. R. A. (N. S.) 623, note.

Thomas Hill married Jane Pearson; and they and Rushworth, who was then an infant, filed the bill against Simpson and Wright, Thorley being dead, and against the assignees and the bankers; praying, that it may be declared, that the funds transferred by Simpson to the bankers are liable to the legacies of the plaintiffs, etc.

The defendants Moffatt & Co. by their answer set up the advances made by them and the transfer of the annuities and stocks to them by the defendant Simpson on May 11, 1797, to secure past and future advances by them to him. They denied, that they knew, or suspected, that the funds were not at the time of the transfer the absolute property of Simpson as executor or devisee of Elizabeth Smith; or that they were part of the personal estate of John Smith; on the contrary they believed they were Simpson's own property; and he represented to them that he was absolutely entitled thereto, subject only to an annuity of £20 to Elizabeth Smith's sister during her life, and to a few very small legacies; that he had full right to dispose thereof; and would have disposed but for the low price of the funds; which he expected would rise. They also stated, that they did not know any of the legacies of John Smith to the plaintiffs or any other person were unpaid.

The answer farther stated that on the 21st of June, 1798, when Simpson became bankrupt, he was indebted to defendants on the balance of accounts in £1,435 19s. 6d.

The answer was replied to; but the plaintiffs did not go into evidence.

The Master of the Rolls. [Sir William Grant].[23] The question is whether the plaintiffs, legatees, can follow the assets in the hands of third persons, to whom the executor has transferred them. There is no evidence in the cause but the answer. I cannot therefore infer anything against the defendants, which they do not admit; for it was in the power of the plaintiffs to procure an explicit admission or denial of every fact, within the knowledge of the defendants. I cannot assume, that they ever saw Mrs. Smith's will; though Simpson says, he was to produce it to them; for they do not say, they ever did see it. Without doubt the plaintiffs are entitled to a decree against the executor, now a bankrupt; and his assignees are parties.

Several well-known cases were referred to on both sides. The defendants rely upon Nugent v. Gifford, 1 Atk. 463, Mead v. Lord Orrery, 3 Atk. 235, and Whale v. Booth, 4 Term Rep. B. R. 625, note, as establishing the absolute right of the executor to bind the assets by any disposition; at least, where there is no actual fraud in the party taking under it. The other cases, Humble v. Bill, 2 Vern. 444, Crane v. Drake, 2 Vern. 616, Farr v. Newman, 4 Term Rep. B. R. 621, Bonney v. Ridgard, 2 Bro. C. C. 438, and Andrew v. Wrigley, 4 Bro. C. C. 125, are relied on by the plaintiffs as showing that there

[23] The statement of facts is abbreviated.

are limits to that rule, which limits they contend are here transgressed. Though it is difficult to reconcile all the doctrine and dicta, that are to be found in the cases, the decisions do not appear to me to be inconsistent. It is true, that executors are in equity mere trustees for the performance of the will; yet in many respects and for many purposes third persons are entitled to consider them absolute owners. The mere circumstance, that they are executors, will not vitiate any transaction with them; for the power of disposition is generally incident, being frequently necessary, and a stranger shall not be put to examine, whether in the particular instance that power has been discreetly exercised. But from the proposition, that a third person is not bound to look to the trust in every respect and for every purpose, does it follow, that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee, when he knows the executor is applying the assets to a purpose wholly foreign to his trust? No decision necessarily leads to such a consequence.

In Nugent v. Gifford it appears from the register's book, as stated in Andrew v. Wrigley, though not in the report in Atkyns, that the testator died two years before the executor and residuary legatee made the assignment, that was impeached. At least therefore there was room to suppose, that the executor might in that period by advances on account of the trust have entitled himself to reimbursement out of the assets; but even so explained, the late Master of the Rolls would not go farther than to say, that case might be rightly determined, and in Scott v. Tyler, Lord Thurlow said (2 Bro. C. C. 477), it was difficult to reconcile it with Crane v. Drake. In Mead v. Lord Orrery, Lord Hardwicke, instead of stating shortly and generally, that an executor has the absolute right to dispose, as he pleases, of the testator's property, enters into all the circumstances to show, that in that case the assignment ought to stand; that it was made several years after the testator's death; that it was not the case of a sole executor disposing for his own benefit, but of three executors, two not interested, one a residuary legatee; that, as he was one of the executors, and in his banking shop the money affairs were transacted, he might have been, as he was recited to be, the sole owner of the mortgage. He might be a creditor for that sum by advances made by him; or it might have been released and assigned to him by the other executors, as his share of the residuary estate. Under all those circumstances perhaps it would have been hard to have deprived the assignee of the benefit; and yet Lord Kenyon in Bonney v. Ridgard, with an accurate note of which I have been favored by Mr. Cox, declared his dissent from that case, and declared he should have given the opposite decision; and yet there was nothing like express fraud, and no motive for it, in order to obtain that assignment; for Mead the younger was not indebted, but was only to give security for what might come to

him afterwards as receiver, and he used the mortgage for that purpose. It was indifferent to them, whether they had that or any other security. But Lord Kenyon says, that, if there is either express or implied fraud, the purchaser is bound. In Whale v. Booth, though that case seems overruled by Farr v. Newman, stress was laid upon the circumstance, that the testator had been dead three years; and Lord Mansfield says: "If the executors paid all demands, as in that time they might have done, the assets belong to them."

Those three cases for the defendants are in some degree impeached in subsequent decisions. But, supposing they were not impeached, there is nothing in any of them excluding the possibility of the executor having acquired on the execution of the trust, a right to appropriate to himself the assets. But in this instance the assignment was made in less than a month after the death of Mrs. Smith. There is not therefore the least ground for the presumption of right acquired to the assets of Mr. or Mrs. Smith by payments made in that short interval on account of either estate. It is not pretended, it was to satisfy any claim on either estate; for the express purpose appears to have been to secure a debt of his own, which he already owed to the bankers, and other advances they were to make by taking up bills of his, then actually outstanding. They had distinct notice therefore, that the money was not to be applied to any demand upon either estate; but the assets were to be wholly applied to the private purpose of the executor. Allowing every case to remain undisturbed, does it follow from any, that an executor in the first month after the testator's death can apply the assets in payment of his own debt, and that a creditor is perfectly safe in so receiving and applying them, provided he abstains from looking at the will, which would show the existence of unsatisfied demands? I am for the moment keeping out of sight the representation made by Simpson, and supposing the question to be, whether an executor may thus deal and be dealt with; and it is clear, no rule of justice permits, or of convenience requires, that he should have this unbounded power. Though it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right. It may be essential, that the executor should have the power to sell the assets; but it is not essential, that he should have the power to pay his own creditor, and it is not just, that one man's property should be applied to the payment of another man's debt.

But the question is, not, whether the rule is now to be made more strict, but whether general justice and convenience require it to be relaxed beyond all former precedent. I should hesitate to go so far as other cases have gone; but this would go much farther than any. If the second point in Scott v. Tyler had received the decision which

it was generally supposed would have been given [24] it would be an authority far beyond what these plaintiffs want; for in that case the executrix had disposed of the River Lee bonds four years after the death of the testator. The bankers swore they knew nothing of the will; and they believed the bonds her own property, not that of the testator. If that case had been decided against the bankers, it would have furnished a stronger authority than is necessary for these plaintiffs.

Hitherto I have supposed the executor pretending on other authority than as executor, and that the other defendants relied solely upon his authority in that character. But the truth is, it was not upon his legal authority as executor that they relied; but they proceeded, as they state, upon the faith of his representation, by which they were induced to believe, that the property he assigned to them was actually his own, as the testatrix had left him everything, subject only to £20 a year, and a few small legacies. This representation is partly true, partly false. He was her residuary legatee, and it is taken for granted on all sides, that she had a right to dispose of this property; but he was subject to something more than £20 a year, and some trifling legacies, viz., the claims under her husband's will. This they would have seen, if they had looked at her will, instead of taking his representation. They would have seen, that he had no right to assign the stock, till the claims under that will were satisfied, and that some of those claims were unsatisfied. Common prudence required, that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that, and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud; but they acted rashly, incautiously, and without the common attention used in the ordinary course of business, the reference in the will of Mrs. Smith to the will of her husband making it the same, as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information, which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding, that assets transferred under such circumstances may be followed.

For the defendants it is objected, that the plaintiffs were guilty of laches in not taking steps to secure their legacies in the life of Mrs. Smith. But one was an infant, when the bill was filed, and his legacy was not payable till her death; and though the plaintiff Hill might have filed a bill, it was not gross negligence not to do so for so small an object. There was no reason to think the fund was in danger; and

[24] It has since appeared that, though that point ended in a compromise, Lord Thurlow had formed his judgment upon it against the bankers. See 2 Dick. 724.— Rep.

upon inquiry she would have found stock sufficient left to answer her legacy. Upon the whole I am of opinion, these funds are liable to answer the plaintiffs' demands.

TAYLOR v. HAWKINS.

(High Court of Chancery, 1803. 8 Ves. 209.)

Richard Hawkins, being possessed of certain leasehold premises at Rotton Park, Birmingham, subject to a mortgage to Mary Dalton, by his will, dated the 6th of January, 1790, bequeathed the mortgaged premises and other leasehold estates to his son William Hawkins, to hold to him, his executors, etc., for the residue of the terms, subject to an annuity of £15 to his son Richard Hawkins for twenty years, if he should so long live; and in case his said son should die before the expiration of that term, then to the payment of the said sum of £15 for the remainder of the twenty years to his (the testator's) wife for the use of his children, Sarah, Mary, and George Hawkins; and he appointed his wife and his son William executors.

Richard Hawkins, the testator, died in November, 1792. The executors proved the will. William Hawkins being engaged in trade in partnership with Thomas and John Hawkins became indebted to the plaintiffs as bankers to the amount of £2,000; and in June, 1793, they executed a bond in the penal sum of £3,000; and also by indenture of mortgage, dated the 24th of June, 1793, William Hawkins assigned the premises at Rotton Park to the plaintiffs, subject to the mortgage to Mary Dalton, and to the annuity of £15 under the will of Richard Hawkins, and to a proviso for redemption on payment of £1,500 and interest, and all other sums to be advanced by the plaintiffs.

In October, 1796, William Hawkins and his partners became bankrupts. In March, 1798, by consent of all parties the mortgaged premises were sold for £1,600. Upon that occasion James Reynolds informed the purchaser, that he was a creditor of Richard Hawkins the elder, by a bond, dated the 20th of July, 1784, in the principal sum of £300, and gave notice not to pay his purchase money.

The bill filed by Taylor and his partners, Taylor being also administrator of Mary Dalton, prayed an account of the personal estate of the testator Richard Hawkins; that the purchaser may pay his purchase money, and that the purchase money may be applied in satisfaction of the mortgages; and that the defendant Reynolds may be decreed not to have any lien or claim upon the purchase money in preference to the plaintiffs.

The defendant Reynolds by his answer insisted upon his bond for money lent; and stated frequent applications to the executors before the bankruptcy. He claimed a balance of £452 8s. 10d. as due upon the bond, after deducting a sum of £94 1s. received from the sale of

leasehold premises mortgaged to him as an additional security. He insisted, that the surplus of the purchase money after satisfying Mrs. Dalton's mortgage ought to be applied in satisfaction of what remains due on his bond in preference to the mortgage to the plaintiffs, especially as such mortgage was executed, not for the purpose of raising any money to discharge the debts of the testator, but only to secure the payment of debts personally incurred by William Hawkins and his partners with the plaintiffs in the course of their trade. He denied all fraud and collusion with Hawkins, and insisted that he is a bona fide creditor, and ought to be paid out of the leasehold premises, as being the assets of Richard Hawkins, in preference to the plaintiffs' demand.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT]. I do not recollect any case, in which the property was specifically bequeathed to the executor; but the person, to whom it has been specifically given, has generally been the party complaining. In this case there is not enough in this answer to ground an inquiry; if not, there is nothing to stand upon. There must be some foundation for an inquiry; as if he had said, he believed, they knew, there were debts unpaid. The decree must therefore be according to the prayer of the bill.[25]

LESSING, MAYER & CO. v. VERTREES.

(Supreme Court of Missouri, 1862. 32 Mo. 431.)

Henry Binswanger, as administrator of Solomon Binswanger, deceased, had sold the goods of the intestate, and taken in payment the notes of the defendants, Vertrees et al., payable to himself as administrator, and upon such notes, upon default of payment, had obtained judgment. The plaintiffs, having obtained judgment against Henry Binswanger, issued execution and summoned the defendants, Vertrees et al., as garnishees of said Henry. The garnishees answered, setting up the purchase of the goods and giving of the notes to Henry as administrator, and concluded by denial of all indebtedness to said Henry. Issue was taken by the plaintiffs upon the answer, and the facts submitted to the court, which held that the garnishees were not liable as debtors of Henry Binswanger, and gave judgment for said garnishees. From this decision the plaintiffs appealed.

BAY, J. The question presented for our consideration in this case is, whether the personal property and effects of a decedent, in the

[25] In In re Henson, Chester v. Henson, [1908] 2 Ch. 356, it was held that a beneficial devise of land in fee to a devisee, who is also an executor, subject to a general charge of debts and legacies, empowers that executor devisee to sell or mortgage the land and to give a good receipt to the purchaser or mortgagee, who is not bound to see to the application of the purchase or mortgage money, even if it is expressed to be raised for the payment of legacies only.

hands of his executor or administrator, can be seized by a judgment creditor of such executor or administrator, and applied to the payment of the individual indebtedness of such executor or administrator.

The plaintiff in error contends for the affirmative of this proposition, and relies chiefly upon the decision of the Supreme Court of this state in Lacompte v. Seargent, 7 Mo. 351, in which Judge Tompkins, in delivering the opinion of the court, said: "No principle of law is more generally acknowledged than that the executor or administrator is, for every purpose, the owner of the moneys of his intestate which have come to his hands."

The same doctrine was acquiesced in, in Thomas v. Relfe, 9 Mo. 377; but, after a careful examination of the question, we are at loss to discover any good reason upon which it can be maintained. It is true, that at common law the legal property in the personal estate of the testator vests, on his death, in the executor, and for many purposes [he] may be regarded as the owner. He may, for instance, maintain an action for a wrongful conversion of the property, or for any injury to the property, in his individual name, and for every purpose necessary to enable him to discharge the duties of his office he is regarded in law as the owner of the property. As a necessary incident to the nature of the office, he has a disposing power over the property; but that he is the owner for every purpose, cannot be maintained upon either reason or authority. The only authority cited by Judge Tompkins is Farr et al. v. Newman et al., 4 Durnford & East, 347; but that case, so far from supporting the doctrine contended for, is an authority to the contrary. Chief Justice Kenyon, Justice Grose, and Justice Ashhurst, in separate opinions, held that goods of a testator in the hands of his executor could not be seized in execution of a judgment against the executor on his own right. Buller, J., gave a dissenting opinion, and it is this dissenting opinion, and not the opinion of the court, that Judge Tompkins had in view, when writing the opinion in Lacompte v. Seargent.

Grose, J., reviewed the question at great length, and thus refers to the rule as contended for by Justice Buller: "The injustice is obvious. It is to make the goods of A. pay the debts of B.; and possibly leave the creditors of A. without any redress but against the person of B. One case of intolerable hardship may be put: Suppose the executor indebted to the crown in more than the value of his own and the testator's personal estate; the moment the executor is invested with his authority, an extent issues and sweeps away every shilling of the testator, in fraud of his creditors, legatees, and next of kin. A more shameful act of injustice can hardly exist under the name of law."

Again the learned judge remarks: "Why may not the executor devise the testator's goods; why may not his administrator take them; why are they not forfeited to the crown on attainder; why are they not liable to be seized under a commission of bankruptcy against the executor? The answer and reason is, I think, obvious. It is because

they are not his goods; he is only the distributor and dispenser of them for the benefit of the creditors, the legatees, and the next of kin, of the testator. To permit him to devise them, to permit his administrator to take them, to permit the assignees, under a commission against the executor, to seize them, and to permit the sheriff, under an execution issued against his goods, to take them, would be to dispose of them for purposes for which he had them not—in a way in which it cannot by any law be intended that those purposes will be answered."

In Howard v. Jemmet, 3 Burrows, 1368, Lord Mansfield said: "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator: not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself."

In Comyn's Digest, vol. 1, p. 259, it is said, in speaking of the goods of the testator: "Nor shall they be taken in execution for the proper debt of the executor or administrator."

We think, therefore, that we are justified in saying that Judge Tompkins was mistaken in supposing that either under our law, or the common law, the administrator is the owner, for every purpose, of the goods of the intestate.

Suppose an administrator should die before a final settlement, will it be contended that the goods and effects which were in his hands as administrator, will go to his executor or administrator to pay his debts, or to be distributed among his heirs? Certainly not; and why not, if he was, for every purpose, the owner of such goods and effects?

But if any doubt can exist as to the rule under the common law, it is very clear that under our statute the administrator is in no sense the unqualified owner of the goods of his intestate. The act defining his duties and powers requires him to give a bond, with two or more sufficient securities; and one of the conditions of the bond is, "that he shall account for, pay, and deliver all money and property of said estate." He is further required to have the personal property appraised, and to file an inventory of the same, which inventory must be made in the presence of witnesses appointed for that purpose; and if he shall open or examine the papers, money, or other property of the deceased, without the publicity and attestation provided in the act, he becomes liable to pay to the persons entitled to the estate a sum not exceeding five thousand dollars. So his duties with respect to the sale and disposition of the personal property are marked out and defined, and penalties are imposed for any neglect of the same. If he shall die or resign, or his letters be revoked, he or his legal representatives must account for, pay and deliver to his successor, or to the surviving or remaining administrator, all money, real and personal property, of any kind, of the deceased; and the succeeding or remaining administrator is empowered to proceed at law against the delinquent and his securities, or either of them, or against any other person possessed

of any part of the estate. He is further required to make annual settlements with the county or probate court; and after a final settlement of the estate (and sometimes before), the personal effects remaining in his hands are to be distributed among those entitled thereto, as such court shall order and direct.

These and other provisions of the statute upon the same subject show very conclusively, that, under our system of laws, the administrator is by no means the absolute owner of the goods and effects of the intestate. If the law was otherwise, and such property could be seized for the payment of the individual liabilities of the administrator, it would result most disastrously to creditors, heirs and legatees. They would be wholly remediless; for it can hardly be contended that the securities in the administration bond would be liable for property thus misappropriated when it becomes the act of the law, and does not result from any negligence or misconduct of the administrator.

The judgment of the court below will be affirmed; the other judges concurring.[26]

MACKAY v. ST. MARY'S CHURCH.

(Supreme Court of Rhode Island, 1885. 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881.)

STINESS, J.[27] The plaintiff sues, as indorsee, upon two notes given by the defendant corporation to William H. Kelly and James Duffy, administrators upon the estate of William E. Duffy. It is admitted that William E. Duffy died in Connecticut; that these persons were appointed administrators in Connecticut, and also in the state of New York, where both of them reside; and that the defendant corporation, by its treasurer duly authorized, gave the notes in the settlement of a debt admitted to be due from the corporation to the estate of William E. Duffy. April 8, 1881, after the notes were due, the defendant paid $600 on account to James Duffy, one of the administrators, under an arrangement made with him to settle the whole indebtedness at a future time, for the face of the notes, without interest. After this, and before April 23, 1881, William H. Kelly, the other administrator, "for himself and James Duffy, administrators of estate of William E. Duffy, deceased," indorsed one of the notes, and delivered the other, which was made payable to the plaintiff as attorney, and by him indorsed in blank, to plaintiff for his fees for legal service rendered in settlement of the estate, his bill having been subsequently allowed by the surrogate in New York, in Kelly's account, to the amount of $3,000. Thereupon the plaintiff notified the defendant of his ownership of the notes, and demanded payment. April 30, 1881, after such notice,

[26] See Satterwhite v. Carson, 25 N. C. 549 (1843).

[27] Part only of the opinion is given.

the defendant paid to James Duffy, administrator, $900 more, and took from him a general release, under seal, of all claims of the estate of William E. Duffy against the defendant, and particularly of the notes in question; the balance, as agreed, to be paid when Duffy should obtain and surrender the notes. * * *

2. Can a note given to two joint administrators be transferred by one of them? There is no question that one of two executors or administrators may transfer notes held by the deceased, for the reason that the several persons are considered as holding one office, and, in the settlement of the estate, the act of one is equivalent to the act of all. The power of the office may be fully exercised by one, for each takes the whole in his representative capacity, and not a moiety. Stone v. Bank, 13 R. I. 25. When, therefore, administrators, in collecting assets, take a note payable to themselves as administrators, though the form of the obligation be changed, its character is the same; it is still a debt due to the estate, not to them personally, and its proceeds are assets of the estate. We see no reason, therefore, why the same rule should not apply as though the obligation remained in its original form. The case is quite different from the ordinary case of joint payees, who may have adverse interests, and where each is entitled to hold his moiety of the obligation until he sees fit to part with it. In the ordinary cases of joint payees, excepting, of course, copartnerships, neither one represents the other; one alone, therefore, cannot transfer a note without the other. But where one represents the whole, as a partner or an administrator, the rule should follow the reason. And thus it has been held in Bogert v. Hertell, 4 Hill (N. Y.) 492, where the cases upon this point were carefully examined. See, also, 1 Daniel, Neg. Inst. § 268, and 1 Pars. Bills & N. p. 159.

Most of the cases to which we have been referred by the defendant are cases of individual joint payees, and cases of partners after dissolution. In Sanders v. Blain's Adm'rs, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86, the court said that the administrator and administratrix might have sued jointly or individually; but as the administrator had undertaken to act individually, not as administrator, he could not transfer the note without the other payee. Smith v. Whiting, 9 Mass. 334, is commented on in Bogert v. Hertell. In the present case the notes were given for different amounts, and in different tenor, for a debt due to the estate represented by the administrators. They were, therefore, assets of the estate, and, as such, we hold that they could be dealt with as other assets of the estate by either administrator. * * *

We conclude, therefore, that the plaintiff is entitled to recover the amount due upon the notes when they came into his hands. Judgment for plaintiff.[28]

[28] "Co-executors, however numerous, constitute an entity, and are regarded in law as an individual person. Consequently the acts of any one of them in respect to the administration of estates are deemed to be the acts of all, for

In re O'DONNELL'S ESTATE.

(Irish Court of Appeal. [1905] 1 Ir. Rep. 406.)

February 10, 1876, Dominick O'Donnell mortgaged certain lands to George Latchford to secure £350 with interest at 8 per cent. August 11, 1878, George Latchford died, and September 23, 1878, letters of administration were granted to James Latchford, one of the seven next of kin. December 20, 1886, James Latchford executed to Alfred Henry a submortgage of the mortgage of February 10, 1876, which submortgage was to secure £200 with interest at 8 per cent.. James Latchford told Alfred Henry at the time that he was borrowing the money for the purpose of paying certain debts of George Latchford, deceased, and also of paying a distributive share of the assets to a younger brother who was going abroad. In 1887 James Latchford went to Australia and did not return. Grant of administration to him was then revoked, and July 7, 1903, letters of administration de bonis non were granted to Richard Latchford. It was objected in this proceeding that the submortgage of £200 was not a valid mortgage of the

they have all a joint and entire authority over the whole property. Williams, Ex'rs, 810; Wheeler v. Wheeler, 9 Cow. 34. Thus one of two executors may assign a note belonging to the estate of the testator (Wheeler v. Wheeler, supra), or make sales and transfers of any personal property of the estate (Bogert v. Hertell, 4 Hill, 492). He may release or pay a debt, assent to a legacy, surrender a term, or make an attornment without the consent or sanction of the others. Williams, Ex'rs, 812; Jackson v. Shaffer, 11 Johns. 513; Douglass v. Satterlee, 11 Johns. 16; Murray v. Blatchford, 1 Wend. 583, 19 Am. Dec. 537. It was said in Wheeler v. Wheeler, supra, 'that, if a man appoint several executors, they are esteemed in law as but one person representing the testator, and that acts done by any one of them, which relate to the delivery, gift, sale or release of the testator's goods, are deemed the acts of all.' It would seem to follow from this principle that they have the power of joint and several agents of one principal, and that any act done or performed by one, within the scope and authority of his agency, is a valid exercise of power, and binds his associates." Ruger, C. J., in Barry v. Lambert, 98 N. Y. 300, 308, 50 Am. Rep. 677 (1885). But see Smith v. Whiting, 9 Mass. 334 (1812).

Liability of One Personal Representative for the Acts of Another.—"The defendant P. is not responsible for the devastavit of his co-executor, C., any further than he is shown to have been knowing and assenting at the time to such devastavit or misapplication of the assets of the estate. Both the executors could not, with any kind of convenience, jointly possess and hold all the assets. The assets must, from the necessity and reason of the case, have been distributed between the executors, for the purpose of collection and security; and it appears to be settled, and upon very just principles, that one executor shall not be chargeable with the waste of the other except so far as he concurred therein, and that merely permitting the other to possess the assets, without going further, and concurring in the application of them, does not render him answerable for the receipts of the other. Hargthorpe v. Wilford, Cro. Eliz. 318; Harvey v. Blakeman, 4 Vesey, 596. Each executor is liable only for his own acts and what he receives or applies, unless he hands over the moneys collected or received to his co-executor, or joins in the direction or misapplication of the assets." Chancellor Kent, in Sutherland v. Brush, 7 Johns. Ch. (N. Y.) 17, 22–23 (1823). To the above statement, however, should be added the following: "So, if he carelessly permit the co-executor to mismanage or waste the estate, he becomes liable." 2 Woerner's American Law of Administration (2d Ed.) § 349, *738.

mortgage of February 10, 1876, and only affected the beneficial interest of the said James Latchford as one of the seven next of kin of George Latchford. Ross, J., having disallowed the objection, Richard Latchford appealed.

LORD ASHBOURNE, C.[29] This is an appeal from an order of Judge Ross, which raises an interesting point. It appears that in the administration of the business of his court he had to consider a submortgage of a mortgage made originally for £350. The mortgage was made to a man named George Latchford, who died intestate, leaving an estate to be administered. In the course of the administration his personal representative borrowed from Mr. Henry a sum of £200 which he secured by a submortgage of the original mortgage for £350, and he stated that he required the £200 to pay some of the debts of the deceased, and also to pay a share to one of the next of kin. Mr. Henry now comes in asking for payment of this sum of £200, and he is met with the objection. This was not a mortgage made in due course of administration, and you have no right to look for payment to the proceeds of the sale of the lands. The whole question is: Is this submortgage to be regarded as made for the private purposes of the administrator, and not made by him as personal representative, as stated on the face of the mortgage, to raise £200 to be applied for the purposes of the administration? Ross, J., held it was a mortgage rightly made in due course of administration, and he overruled the objection. From that decision an appeal has been taken, and it was argued—not that the mortgage was not bona fide, not that Mr. Henry's conduct was open to question—but that because the mortgagor stated to Mr. Henry that the money was required to pay off debts, and also to pay one of the next of kin, though it would be right so far as payment of debts is concerned, yet the whole thing is invalid, because the mortgagor stated he wanted a portion of the money to pay one of the beneficiaries. The narrow way in which the case was presented by Mr. Wilson and Mr. Brady was that though the mortgage was rightly executed, so far as the payment of debts was concerned, yet in so far as the money was used to pay one of the beneficiaries it was invalid, and that that so tainted the whole, that it would invalidate the entire mortgage. As Mr. Wilson put it, if an administrator went into the market to borrow money for the purposes of the administration, if he borrowed £1,500 for payment of debts, and £50 to pay one of the next of kin, the mortgage would be void.

I think that in this case the payment to the next of kin might be reasonable and proper, and that Ross, J., was right in his view of the case. This was a bona fide advance to an administrator, describing himself as such, for purposes none of which were personal to himself. I am, therefore, of opinion that the order appealed from should be affirmed, and that the appeal should be dismissed with costs.

[29] The statement of facts is rewritten and abbreviated. The opinion of Ross, J., below is omitted

WALKER, L. J. I concur. This mortgage was made twenty years ago, in 1886, eight years after the death of the intestate, at a time when there was no presumption that the debts were paid. The administrator applied for a loan, and he told Mr. Henry, to whom he applied, that he wanted the money to pay debts, and also for the purpose of making an advance to one of the next of kin. In my opinion both these objects were for the purpose of administration—(1) to pay debts; and (2) to pay one of the next of kin. The transaction did not involve a private debt, and was not a devastavit. We are asked by the appellant to say that it was a bad mortgage from first to last. That I am not prepared to lay down. I think that an advance may be obtained by an administrator to pay a portion to one of the next of kin without committing a devastavit. There is nothing to show that it was a devastavit, beyond this—that one of the objects for which the money was advanced was for the purpose of paying one of the next of kin. That is a purpose of administration, though payment of debts comes first. It is as much the duty of an administrator to pay the next of kin as to pay the debts of the deceased.

HOLMES, L. J. In 1886 James Latchford was the administrator of George Latchford's estate, part of which consisted of a mortgage. I am satisfied on the facts of the case that it was impossible to get in the whole of this mortgage at the time. It could not have been realized in the Land Judge's Court at that time, and it has not been realized since. Therefore, in 1886 the administrator had vested in him a mortgage which could not be realized. The administrator requiring money borrowed the amount from a lender, telling him that he wanted it to pay debts, and also to pay one of the next of kin portion of his demand. Under these circumstances the question is: Was it a good mortgage, for the ordinary purposes of administration? So far as the money raised by the mortgage was required for the payment of debts, it was a good mortgage; but I think that an administrator may also make an advance to one of the next of kin, without committing a devastavit, and that he can raise the money by sale or mortgage for that purpose without any illegality. That is the ground of the decision of Ross, J.; and I think it is right.[30]

[30] In Russell v. Plaice, 18 Beav. 21 (1854), the power of an executor or administrator to mortgage was held to include the power to give a power of sale mortgage.

CHAPTER III

THE PAYMENT OF DEBTS OF THE ESTATE

SECTION 1.—CLAIMS AGAINST THE ESTATE

CRAVATH v. PLYMPTON, Adm'r of Goodenow.

(Supreme Judicial Court of Massachusetts, 1816. 13 Mass. 454.)

This was an action on the case, originally commenced by the plaintiff, against the said Goodenow, late a deputy under William Hildreth, Esq., late sheriff of this county, for a nonfeasance in neglecting to levy an execution for the plaintiff on the body of his debtor. The intestate, in his lifetime, pleaded not guilty, and died before a trial of the issue. At November term, 1814, the defendant, having sued out letters of administration on the estate of Goodenow, came into court, and moved that the action should be dismissed, on the ground, that it did not survive against him.

PUTNAM, J. It is settled in many of the books (Com. Dig. Tit. "Administration," B., 14, cites 41 Ass. pl. 15; Dyer, 322; 1 Rol. 921, 1, 20; 2 Inst. 382; 1 Saund. 21) that trespass does not lie against the executor of a gaoler for an escape; and, in the case of Hambley et al. v. Trott, Adm'r, Cowp. 371, it was decided that actions arising ex delicto, as, for assault and battery, imprisonment, trespass, words, nuisance, and escape against the sheriff, die with the person.

The principles adopted seem to be that, where the deceased, by a tortious act, acquired the property of the plaintiff, as, by cutting his trees and converting them to his own use, or by converting his goods to his own use, although no action of trover or trespass will lie, yet the law will give the plaintiff some form of action, to recover the property thus tortiously obtained. But where, by the act complained of, the deceased acquired no gain, although the plaintiff may have suffered great loss, there the rule, "Actio personalis moritur cum personâ," applies.

The case at bar comes within the latter branch of the rule. The deceased had no pecuniary benefit by reason of his wrongful act. The reparation, to which the plaintiff was entitled, was for the damages he had sustained from the tort, and not for any property the deceased had obtained.

Although the statute of 1805, c. 99, § 2, has altered the common law in relation to suits against the executors and administrators of

the sheriff, by providing for their liability to suits for the malfeasance or nonfeasance of the sheriff or his deputy, yet we are not disposed to extend the liability to the administrators of deputy sheriffs, as the statute has not included them in the provision.

Action dismissed.[1]

STEBBINS v. PALMER.

(Supreme Judicial Court of Massachusetts, 1822. 1 Pick. 71, 11 Am. Dec. 146.)

Julia Palmer, the respondent, brought an action for a breach of promise of marriage against Benjamin Stebbins, who died while the action was pending. Nearly two years after his death, she made application to the judge of probate, representing that no person had taken out letters of administration on his estate, that she was a creditor, and at the time of his death had an action pending against him, which had been continued from time to time, to enable her to summon in any person who should be appointed administrator, and praying that letters of administration might be granted to such person as the judge should think proper. It was accordingly decreed that letters of administration should be granted. Marytta Stebbins, the widow of Benjamin, having omitted to appeal from this decree in the ordinary way, now petitioned the court for leave to enter an appeal, pursuant to St. 1817, c. 190, § 8, alleging that her omission arose from mistake. And whether justice required a revision of the decree depended on the question whether the respondent was interested as a creditor in the estate of the deceased.

WILDE, J. [After stating the grounds on which the court thought it reasonable that the petitioner should be permitted to enter her appeal, in conformity with St. 1817, c. 190, § 8, if she could show that justice required a revision of the decree, he proceeded:]

This she attempts by referring us to the grounds on which the decree is founded, which, her counsel have argued, are insufficient in law to sustain it. They contend that no one interested in the estate

[1] "The principle involved is: In the case of a tort directly resulting in the wrongful acquisition of property, the law imposes on the wrongdoer the duty of returning that property to the owner. This duty may be treated as a quasi contract, and the neglect to perform it may become a breach of contract. In such case the damage resulting from the tort is substantially the value of the property, and the damage resulting from the breach of contract is substantially measured in the same way; and, so for determining the question of survival, the substantial cause of action may properly be treated as founded in contract, although the form of action might sound in tort. But such principle cannot apply unless property is acquired; merely deriving benefit from the tort is not sufficient." Per Hamersley, J., in Payne's Appeal, 65 Conn. 397, 32 Atl. 948, 33 L. R. A. 418, 48 Am. St. Rep. 215 (1895).

In Hambley v. Trott, Cowp. 371 (1776), it was held that the tort form of action was fatal to recovery, even though a quasi contractual obligation existed, and that the contract form of action must be resorted in in such case.

is desirous that administration should be granted, and that there is no necessity for incurring such an expense. If this has been made to appear, the decree ought to be reversed.

Generally administration ought not to be granted, except on the application of some one entitled to administration, or who is interested in the estate to be administered upon. The question then is whether the respondent is interested in, or has any claims upon, the estate of the deceased. At the time of his decease she had an action against him pending in this court, founded on the breach of a promise of marriage; and if this action by law survives, there is good ground for granting letters of administration, whether, strictly speaking, she is a creditor or not; for in such case justice would require that administration should be granted, so that the action might be prosecuted to final judgment. The principal question, therefore, is whether such an action by law survives.

The maxim, "Actio personalis moritur cum persona," decides nothing, for it is admitted that it is not applicable generally to contracts, and, although it commonly does apply where the cause of action is a tort, or arises ex delicto, yet in many such cases the tort may be waived and in an action founded on the principles of civil obligation damages may be recovered for a trespass. Where there is a duty, as well as a wrong, an action will survive against the executor. He is responsible for the debts of the deceased, and for all undertakings and acts that create a debt, as far as there are assets. And it seems to make no difference, whether the debt be certain or uncertain, or whether it arises from a promise express or implied.

If the cause of action has been beneficial to the testator, the executor shall be charged. "Where," says Lord Mansfield, "besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor; but if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, the person injured has only a reparation for the delictum in damages to be assessed by a jury." Cowp. 376. The distinction seems to be between causes of action which affect the estate, and those which affect the person only; the former survive for or against the executor, and the latter die with the person.

According to this distinction, an action for the breach of a promise of marriage would not survive; for it is a contract merely personal, at least it does not necessarily affect property. The principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling in substance deceit and fraud, than a mere common breach of promise. The damages may be, and frequently are, vindictive, and, if they could be proved against the executor, might render the estate insolvent, to the loss and injury of creditors. For these and other reasons it has been settled in England that such an action does not survive for an executor. If this was rightly settled, it is

decisive, for the law is unquestionably the same, whichever party may die.

The case of Chamberlain v. Williamson [2 M. & S. 408] was considered as an action of the first impression, which shows at least what the law was supposed to be before. This is a consideration of no small weight, which, joined to the principles and reasoning of that case, is entirely convincing.

The respondent has laid no special damages in her declaration, and has not averred in her application to the judge of probate that she has sustained any; if she has any proof to support such an averment, she may apply anew to the judge of probate, and, if administration should be granted, may commence a new action. Whether, in such an action for special damages, she would be allowed to recover full damages, or would be restricted to those which relate to property, we do not now determine.

Decree of the judge of probate reversed.[2]

JENKINS v. FRENCH.

(Supreme Court of New Hampshire, 1879. 58 N. H. 532.)

Assumpsit. The question reserved was, whether this action could be maintained against the administrators for unskilful treatment of the plaintiff by the deceased.

STANLEY, J. The precise point here presented has been decided in Vittum v. Gilman, 48 N. H. 416, and we find no good reason to doubt the correctness of that decision.

It is conceded that if the action were in tort it could not be maintained; but the plaintiff claims that, being in contract, a different rule prevails.

[2] See Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250 (1874); Chase v. Fitz, 132 Mass. 359 (1882); Finlay v. Chirney, 20 Q. B. D. 494 (1888). Compare Price v. Price, 75 N. Y. 244, 31 Am. Rep. 463 (1878).

"As before intimated, the phrase 'the allegation of special damage' undoubtedly found its way into the books because of extreme caution on the part of the learned judges who were called upon to decide a case arising for the first time, and all the possible aspects of which it was not deemed necessary to anticipate." Lord, J., in Chase v. Fitz, 132 Mass. 359, 364 (1882).

"I know, however, of no case in which special damage has been laid and the action has been maintained, and there is no authority to enable us to decide how such a case should be dealt with. Indeed, I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length." Lord Esher, M. R., in Finlay v. Chirney, 20 Q. B. D. 494, 499 (1888).

In Johnson v. Levy, 118 La. 447, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378 (1907), it was held that under the Louisiana Code one is put in such default by a demand that he comply with his engagement to marry and by a refusal on his part, that his obligation thereupon ceases to be purely personal, becomes an obligation to respond in damages, and, being therefore susceptible of fulfillment by others, survives his death.

The general doctrine, to which this case forms no exception, is that actions for the redress of personal injuries only do not survive, and this without regard to the form. It is true, as a general proposition, that actions in form ex contractu survive, but this is due rather to the substance of the action than to its form. There are actions, such as arise from the negligence of an attorney, or of a coach proprietor, where the plaintiff seeks to recover damages, which survive, but in these the primary cause of complaint is the injury to property and rights of property, and the personal injury is incidental.

The line of demarcation, separating those actions which survive from those which do not, is, that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental. This distinction is recognized in all the authorities. Broom, Max. 702; Com. Dig. "Administration," B, 15; Hambly v. Trott, Cowp. 375; Chamberlain v. Williamson, 2 M. & S. 408; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; Smith v. Sherman, 4 Cush. (Mass.) 408; Wade v. Kalbfleisch, 58 N. Y. 282, 285, 287, 17 Am. Rep. 250; Lattimore v. Simmons, 13 Serg. & R. (Pa.) 183; Chitty Pl. 67, 90; Bouv. Inst. 2755, 2756.

In the present case, there is no suggestion of injury to the property or property rights of the plaintiff. Her only complaint is of her personal injuries by the unskilfulness of the deceased, and the action cannot be maintained.

Case discharged.[3]

DAVIS v. NICHOLS.

(Supreme Court of Arkansas, 1891. 54 Ark. 358, 15 S. W. 880.)

COCKRILL, C. J. Curtner killed Nichols in a personal altercation. Nichols' widow, as administratrix of his estate, brought this suit against Curtner to recover damages. The complaint alleged that on the 22d day of January, 1886, the defendant, W. H. Curtner, wrongfully did assault, shoot, and wound the said J. F. Nichols, her intestate, whereof the said J. F. Nichols languished, and languishing did die "on the 23d day of January, 1886." It was further alleged that the plaintiff was the widow and next of kin of the deceased; that as such she was damaged in a large sum, and prayed judgment for that sum, and for general relief. Pending the suit, Curtner died. The question is, can the cause be revived against his administrator?

The action would have abated at common law, and must abate now, unless the statute has changed the common-law rule. The only provi-

[3] See Wolf v. Wall, 40 Ohio St. 111 (1883); Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519 (1885).

sions of the law bearing upon the question are sections 5223–5226, Mansf. Dig. The first two of these sections are taken from the act of 1838, and relate to the revivor of actions ex delicto; the others are from the act of 1883, and confer upon the personal representative of the deceased a right of action for his death when it is caused by a wrongful act, neglect, or default, to be prosecuted for the benefit of the widow and next of kin. It is plain that whatever cause of action J. F. Nichols had against Curtner survived to his administrator by virtue of section 5223, referred to above, and hereinafter copied. Ward v. Blackwood, 41 Ark. 295, 48 Am. Rep. 41; Davis v. Railway Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283.

The terms of the section are specific also to the effect that the cause should survive in favor of Nichols' estate against Curtner's administrator. It is plain, too, that, had Curtner lived, he would have been liable to an action by Nichols' administrator for the benefit of his widow and next of kin by virtue of sections 5225, 5226. But he is dead, and the question is, did the court err in permitting the cause to be prosecuted to judgment for the benefit of the widow and next of kin? The statute under which that branch of the suit was maintained authorizes an action against a wrongdoer, but it is silent as to the administrator of the wrongdoer, and, unless the provisions of the statute first cited cure the defect, the action must abate under the familiar rule of the common law that the wrongdoer and the wrong are buried together.

The question has arisen frequently under statutes which, like ours, are modeled after Lord Campbell's act, and it has been decided invariably against the right of revivor. Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; Moe v. Smiley, 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341; Russell v. Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523; Green v. Thompson, 26 Minn. 500, 5 N. W. 376; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192. The courts were driven to that conclusion in the cases cited, because it was found that the common-law rule as to the survivability of actions had not been changed by legislation; the duty of the courts being to declare the law, and not to make it.

The section of the statute from the act of 1838, already referred to, is as follows, viz.: "For wrongs done to the person or property of another an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or after his death, by his executor or administrator, against such wrongdoer, or, after his death, against his executor or administrator in the same manner and with like effect in all respects as actions founded on contract." It will be observed that this section provides that wrongs to persons or property shall be actionable, but that is only an affirmance of the common law. It does not, therefore, create a new cause of action or liability. It simply devolves an existing common-law right or liability upon the administrator. To that extent it abolished the common law. The injury to the person mentioned in the provision has been construed to

mean a bodily injury or damage of a physical character, and no other (Ward v. Blackwood, supra), and the injury to property, so far as it relates to personal property, is such only as was contemplated by the statute of 4 Edw. III., c. 7, on the same subject (Russell v. Sunbury, supra; Witters v. Foster [C. C.] 26 Fed. 737).

Whether the wrong is a physical injury to the person or an injury to property, the manifest intention is to do nothing more than prevent a subsisting cause of action from abating by the death of a party. The meaning of the legislature is not changed, but may be more plainly seen, by turning the section into this form, viz.: "When one who is entitled to maintain an action for an injury to his person or property dies the action shall survive to his administrator; and, if the wrongdoer dies, it shall survive against his administrator." But the cause of action which survives to the administrator upon the death of one who has received a physical injury does not inure to the benefit of the widow and next of kin. The action which is prosecuted for their benefit is not founded on survivorship but is a new cause of action, which the death itself originates. It begins when the action which survives ends. Davis v. Railway Co., supra.

Many cases illustrating different phases of the question may be found in the authorities referred to in Davis v. Railway Co., supra, and analogies may be drawn from the distinct causes of action which arose at common law where an actionable injury to his person was sustained by an infant or servant. Two actions thus grew out of the same act—one to the infant or servant for the personal injury, another to the father or master for the consequential injury, viz., the loss of service. The injury to the infant or servant was a wrong to his person, within the meaning of the act of 1838, but it was not a wrong to the person of the father or master, within the meaning of that act, although the action was based upon the personal injury inflicted upon the infant or servant. Such was the common-law interpretation of the father's or master's action. Waller v. Chicago, 11 Ill. App. 209; Marys' Case, 5 Coke, 201; Woodward v. Walton, 2 Bos. & P. (N. R.) 482.

The case of Hegerich v. Keddie, supra, is a case in point upon the question for decision. This suit was brought for damages for the death of the plaintiff's intestate against the administrator of the wrongdoer. It seems that the suit was for the benefit of the estate as well as of the widow and next of kin. The statute of revivor construed by the court was couched in the same language as section 5223, Mansf. Dig., except that it does not embrace injuries to the person, and where the word "property" appears in our statute, the broader terms "property rights or interests" are substituted. Of this statute the court said: "The wrongs referred to in these sections are such only as are committed upon the 'property rights or interests' of the testator or intestate, and to the cause of action for which the executors acquired a derivative title alone. The whole scope and design of the statute is to ex-

tend a remedy accrued to the representatives of the deceased party, and provide for the survival of an existing cause of action."

And in speaking of the remedy under a statute similar to our act of 1883 the opinion continues: "The cause of action here provided for does not purport to be a derivative one, but is an original right, conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured for his damages. The description of the actionable cause seems to have been inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action. Whitford v. Railroad Co., 23 N. Y. 465. It will be observed also that the statute, although creating a new cause of action, and passed for the expressed purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or impliedly, to impair the equally stringent rule which precludes the maintenance of such actions against the representatives of the offending party. The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action enforceable against as well as by representatives."

What is there said of the injury to "property rights or interests" applying only to a derivative action is applicable as well to an injury to the person under our statute. It follows, therefore, that the action cannot be revived upon the theory that it is an injury to the person within the meaning of section 5223. The case just quoted is authority also to the proposition that it cannot be revived, under that section, either as an injury to the "property" of the decedent or of his widow and next of kin. In Yertore v. Wiswall, 16 How. Prac. (N. Y.) 8, it was held by the Supreme Court of New York that an action for the benefit of a widow to recover damages of a common carrier for negligently causing the death of her husband was a suit for an injury to her property interests, within the meaning of the statute, and that the action survived the death of the wrongdoer; but the decision was overruled by the court of appeals in Hegerich v. Keddie, supra, and the doctrine of Yertore v. Wiswall has been repudiated, as we are advised, wherever the question has arisen. Russell v. Sunbury, supra; Hamilton v. Jones, supra; Moe v. Smiley, supra; Ott v. Kaufman, 68 Md. 56, 11 Atl. 580.

These cases clearly show that the right of the widow to recover damages for the death of her husband is not based upon an injury to property within the meaning of the statutes. It follows that the action prosecuted for the benefit of the widow abated upon the death of Curtner, and that the court erred in permitting the plaintiff to pro-

ceed to judgment against his administrator for her benefit. For this error the judgment must be reversed.

But the complaint stated a cause of action in Nichols himself, which survived to his administratrix, and she is entitled to prosecute it for the benefit of his estate. Reversed, and remanded for a new trial.[4]

Appeal of QUAIN.

(Supreme Court of Pennsylvania, 1854. 22 Pa. 510.)

LOWRIE, J.[5] In the distribution of the estate of Andrew M. Quain, deceased, the orphans' court allowed a claim for thirty months' ground rent of a lot granted to the decedent on perpetual lease, and which, on his death, descended to his heirs. One year of this rent became due in his lifetime, and was properly charged. The question relating to that which accrued afterwards is not so plain.

We are of opinion that the principle of Torr's Estate, 2 Rawle, 252, and also the principle of Dickinson v. Calahan's Adm'rs, 19 Pa. 227, exclude this part of the claim. Does a ground rent covenant survive against executors and administrators? In its usual form it binds heirs, executors, administrators, and assigns; but still this may be satisfied, as to executors and administrators, if they pay the rent which accrued in the decedent's lifetime.

It is a perpetual covenant, and it is totally impracticable to require it to be performed by executors and administrators; for their office is not perpetual. If we retain the perpetuity of the covenant as against them, even with the restriction that they are to be liable only when the resort to the land is ineffectual, we still prevent all distribution of the estate in their hands; and, as all the lands of the decedent are assets for the payment of debts, we constructively charge the rent of a single lot upon all his lands.

[4] See Murphy v. St. Louis, I. M. & S. R. Co. (Ark.) 122 S. W. 636 (1909). But see Devine v. Healy, 241 Ill. 34, 89 N. E. 251 (1909), where it is held that under the Illinois statutes the only action which may be maintained is that for the wrongful death and it survives the death of the wrongdoer. Local statutes should be consulted.

Compare Garrigan v. Huntimer, 20 S. D. 182, 105 N. W. 278 (1905), where an action against a saloon keeper and his sureties on a bond to pay all damages adjudged to any person under the state statute for injuries by reason of the sale of liquor to persons at the time intoxicated or in the habit of getting intoxicated was held to survive the death of the saloon keeper. In Hassaurek v. Markbreit, 68 Ohio St. 554, 67 N. E. 1066 (1903), a provision in a divorce decree that the husband should pay the divorced wife $100 a month so long as she should live and remain unmarried was held to impose an obligation which survived his death. See, also, Martin v. Thison's Estate, 153 Mich. 516, 116 N. W. 1013, 18 L. R. A. (N. S.) 257, 126 Am. St. Rep. 537 (1908); Knapp v. Knapp, 134 Mass. 353 (1883).

[5] The statement of facts is omitted, as is a sentence of the opinion and the statement of the decree entered.

Nor will it do to hold them liable until the final settlement of the estate. If that suggestion means until all other matters are ready to be settled, then it takes away at once the character of perpetuity belonging to the covenant, and makes its duration, as against the personal estate, to depend upon the accident of the administrator's diligence, or of the involved or simple nature of the estate. If it means until the final settlement of the whole estate, then this perpetual covenant postpones it forever. This cannot be; for the law intends the office of executor or administrator to terminate as soon as possible. It cannot be prolonged on account of perpetual covenants.

Such a prolongation, or such a liability, could not have been contemplated at the creation of the ground rent. The grantor of the land cannot be presumed to have then placed any value on such a covenant; for the personal covenant of the original grantee is as nothing in a series of tenants lasting for ever. The real security is the covenant running with the land and incumbering it; and this is the essential reliance of the owner of the rent. It is an absolute obligation, as against the administrators, or it does not bind them at all. Suppose it absolute; then the duty must be fully performed by perpetual payment, or else it must be discharged by a satisfaction or commutation; and in this latter case the rent would be discharged and the heir released, a result which is certainly unintended. It is a covenant payable, in the contemplation of the parties, out of the profits of the land; and it would be entirely unreasonable that the law should hold the administrator for the rent when it gives the land to the heir. * * *[6]

LUSCOMB v. BALLARD.

(Supreme Judicial Court of Massachusetts, 1855. 5 Gray, 403, 66 Am. Dec. 374.)

Action of contract against the executor of Nathan Cook for services in taking care of the house and furniture of said Cook after his decease. There was evidence that one Osborn, named as executor in the will, but who declined to accept the trust, employed plaintiff to take care of the house; that a special administrator, afterwards ap-

[6] On the other hand, of course, a covenant may bind the executors or administrators, though it does not purport to bind them, but only the covenantor and his heirs.

"This is an action on a covenant of warranty, in which the grantor covenanted 'for himself and his heirs,' and it is argued that under such a covenant the executors are not bound, but the heir only. It is thought that, because the grantor expressly included his heirs in the covenant, he has impliedly excluded his executors; but this does not follow, for by binding himself he binds his estate, so far as it is represented by his executors, whereas the heirs could not be bound without express terms." Lowrie, J., in McClure's Ex'rs v. Gamble, 27 Pa. 288, 290 (1856).

pointed, did not discharge plaintiff, but permitted him to remain. The jury returned a verdict for the plaintiff, and defendant excepted.

THOMAS, J. The jury have found that the defendant neither caused, nor in any way assented to, the employment of the plaintiff for the services for which this suit is brought. He cannot therefore be charged de bonis propriis.

If not liable as of his own goods, has the estate in his hands been charged by the acts of Osborn, or the special administrator, so that there may be a judgment de bonis testatoris? We think not; but that the law is, that by a promise, the consideration of which arises after the death of the testator or intestate, the estate cannot be charged, but that the executor or administrator is personally liable on his contract. And whether the amount is to be repaid from the estate is a question for the court of probate, in the settlement of his account.

The old doctrine seems to have been, that, upon any promise made after the death of the testator or intestate, the executor or administrator was chargeable, if at all, as of his own goods, and not in his representative capacity. Trewinian v. Howell, Cro. Eliz. 91; Hawkes v. Saunders, 1 Cowp. 289; Jennings v. Newman, 4 Term R. 348; Brigden v. Parkes, 2 Bos. & P. 424.

The more recent authorities, however, have settled that an executor may, in some cases, be sued in his representative capacity on a promise made by him as executor; and a judgment had de bonis testatoris. But it will be found that, in these cases, that which constituted the consideration of the promise or the cause of action arose in the lifetime of the testator. Dowse v. Coxe, 3 Bing. 26; Powell v. Graham, 7 Taunt. 581; Ashby v. Ashby, 7 Barn. & C. 444. And an action for goods sold and delivered to one as executor, or for work done for one as executor, charges the defendant personally, and not in his representative character. Corner v. Shew, 3 Mees. & W. 350. See, also, Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83; Davis v. French, 20 Me. 21, 37 Am. Dec. 36; Myer v. Cole, 12 Johns. (N. Y.) 349.

In this commonwealth, an exception is made in the case of funeral expenses of the deceased. For these, the executor or administrator may be charged in his representative character, and judgment be rendered de bonis testatoris. But the case stands on its peculiar ground, and is to be limited to it. Hapgood v. Houghton, 10 Pick. 154.

The modern English doctrine on this point is, that if the executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given orders, he makes himself liable personally, and not in his representative capacity. Brice v. Wilson, 8 Adol. & E. 349, note; Corner v. Shew, 3 Mees. & W. 350; 2 Williams, Ex'rs, 1522.

If the contract of Osborn, or of the special administrator, did not charge the estate, of course the defendant can in no form be liable.

In this view of the case, it is unnecessary to consider how far the

contract of Osborn, who was named executor in the will, but declined the trust, could bind the estate. If the executor could not so charge the estate, a fortiori one who never accepted the trust could not.

Exceptions sustained.[7]

TUCKER v. WHALEY.

(Supreme Court of Rhode Island, 1877. 11 R. I. 543.)

It appears from the bill of exceptions that one Perkins died without leaving sufficient food for his cattle. The day after the funeral the defendant and another went to the plaintiff and obtained $30 worth of hay to feed the cattle of Perkins. Subsequently the defendant was appointed administrator of Perkins' estate. At the trial in the court of common pleas the defendant testified that he gave the plaintiff express notice when the hay was bought that it was for the Perkins estate, and that the plaintiff must look to the estate for his pay. The plaintiff denied this, saying that he sold the hay to the defendant and did not know where it was going, though he understood from what was said by the defendant and his companion that the hay was going to Mrs. Perkins for the stock. The judge instructed the jury that it was wholly a question of fact. If credit was given to the estate, the verdict should be for the defendant; if credit was given to the defendant, the verdict should be for the plaintiff; and the jury should determine to which party credit really was given. To these instructions the plaintiff excepted, and after verdict for the defendant brought the case to this court.

DURFEE, C. J. We think the court below erred in instructing the jury that, if credit was given to the estate, the defendant could not be held. The hay procured of the plaintiff was necessary for the sustenance of the cattle belonging to the estate, and ought to be paid for out of the estate, as an expense incident to the administration. But the estate can only be charged through the administrator, and the defendant is the administrator. He acted for the estate in procuring the hay, and, though it might be difficult to charge him if he had always

[7] On contracts of executors and administrators, see 7 Prob. Rep. Ann. 594, note; 52 Am. St. Rep. 118, note. That an administrator has no authority to enter into a binding contract for the extension of time on a note executed by his intestate, so as to release sureties thereon, is asserted in Daviess County Bank & Trust Co. v. Wright, 129 Ky. 21, 110 S. W. 361, 17 L. R. A. (N. S.) 1122 (1908.) On the liability of a surety on the bond of an executor or an administrator for a debt contracted in the interest of the estate, see 22 L. R. A. (N. S.) 1094, note.

On whether an executor or administrator is liable in his representative capacity for his own torts, see 51 L. R. A. 262, note; 52 Am. St. Rep. 129, note. That an administrator, converting property belonging to another under the belief that it belongs to his intestate, is liable in his representative capacity, and his sureties on his official bond are also liable, is held in Wiseman v. Swain (Tex. Civ. App.) 114 S. W. 145 (1908).

remained a stranger to the estate, the credit being given to the estate, he did not so remain, but, after he so acted, became the administrator, and therefore may be regarded as administrator by relation when he so acted. Credit to the estate means, if it means anything, credit to the administrator, who, if he makes a contract for the benefit of the estate after the intestate's death, may be personally sued thereon. Luscomb v. Ballard, Executor, 5 Gray (Mass.) 403, 405, 66 Am. Dec. 374, and cases there cited. The defendant should have paid the plaintiff's claim and charged it to the estate, and, the charge being proper, would undoubtedly have been allowed by the court of probate.

The exceptions are sustained, and a new trial is ordered in the court of common pleas. Exceptions sustained.

BAUERLE v. LONG et al.

(Supreme Court of Illinois, 1900. 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643.)

PHILLIPS, J.[8] Plaintiff, appellant here, by his amended declaration in case, averred that appellees, as executors of the last will of John H. Schoenberger, deceased, by their duly authorized agent, one O. W. Ballard, agreed to sell and convey to him certain real estate situated in Cook county (describing it); that under said last will said executors were authorized, ordered, and directed to sell and dispose of said real estate upon such terms as to them should seem most advantageous, at either public or private sale. * * *

The breach charged is the failure of defendants to furnish a warranty deed, abstract, etc., and the damages claimed are $100,000, consisting of the $5,000 earnest money paid, and the balance on account of the loss in not obtaining the property, which property plaintiff avers to be worth $340,000. To this declaration a demurrer was sustained. * * *

The executors derived no power under the will of their testator to bind his estate by a warranty deed. The law gave them no such right and authority as executors. No action can therefore be maintained against them in their representative capacity for a breach of warranty, or for a failure to execute a warranty deed, when they have no authority vested in them to make the same. In Vincent v. Morrison, Breese, 227, the administrators undertook to covenant, in a deed of land sold to pay debts of their intestate, that the land was free from incumbrances, and the court say (page 231): "In relation to covenants, the general rule is that an administrator has no power to charge the effects of the intestate by any contract originating with himself; and it seems from the current of decisions that his contracts in the course of his administration, or for the debts of his intestate, render

[8] Part only of the opinion is given.

him liable de bonis propriis"—citing Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83. * * *

In Austin v. Munro, 47 N. Y. 366, it is said: "The rule must be regarded as well settled that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold or delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered or goods and property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts. The principle is that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. Ferrin v. Myrick, 41 N. Y. 315; Reynolds v. Reynolds, 3 Wend. 244; Demott v. Field, 7 Cow. 58; Myer v. Cole, 12 Johns. 349. The rule is too well established in this state to be questioned or disregarded, and any departure from it would be mischievous." The rule is well understood and generally accepted that executors are not chargeable, as such, on their executory contracts. Their acts are subject to the control of the court appointing them; and this, notwithstanding they act under powers conferred by will. Here the will gives them no power to warrant their testator's title, which was all, as executors, they could convey, and a purchaser would only take whatever title the testator had. * * *

The circuit court did not err in sustaining a demurrer to plaintiff's declaration. * * * Judgment affirmed.[9]

9 "We entertain no doubt that, where the executors of the will of a deceased person, empowered by the terms of the will to sell his real estate, enter into an executory contract for such sale, performance of such contract may be enforced in equity at the suit of the purchaser. The contract of sale is, in effect, an execution of the power, and confers upon the purchaser an equitable title to the land sold, and the court will compel the executors to perfect the title by a conveyance, where the contract is fair and for a sufficient consideration, and there is no default or laches on the part of the purchaser." Rapallo, J., in Bostwick v. Beach, 103 N. Y. 414, 421, 9 N. E. 41, 42 (1886). So, where the executors are empowered by will to sell, it seems that a contract by them to pay a real estate commission on such sale will bind them as executors. Ingham v. Ryan, 18 Colo. App. 347, 71 Pac. 899 (1903). On warranties by executors or administrators on the sale of personal property, see 78 Am. St. Rep. 193, 194, note.

Waiver of Statute of Limitations by Executor or Administrator.—On the power of the executor or administrator to waive the defense of the statute of limitations, see 52 Am. St. Rep. 123, note; 78 Am. St. Rep. 188, citing cases pro and con. In Haskell v. Manson, 200 Mass. 599, 86 N. E. 937, 128 Am. St. Rep. 452 (1909), one of the executors of a father, who had given five nonnegotiable promissory notes to his son, the executor of the father being also administrator of the son's estate and entitled as next of kin to one-half of the son's estate, sought as executor of the father's estate to waive the defense of the statute of limitations to the notes by a written acknowledgment of indebtedness and of the payment of $1 on each

SECTION 2.—THE PRESENTATION OF CLAIMS

CROSS et al. v. LONG.

(Supreme Court of Kansas. 1903. 66 Kan. 293, 71 Pac. 524.)

BURCH, J.[10] * * * The only important question for determination is whether appearance in probate court at a hearing upon a claim against an estate, and consent to the allowance of such claim by one of two joint executors, without notice to or the concurrence of the other, is sufficient to bind the estate. In Clark's Adm'rs v. Parkville & G. R. R. Co., 5 Kan. 654, the record disclosed a notice to both administrators, but proof of service of such notice upon only one of them; and the syllabus of the case is as follows: "Service on one of two administrators, of notice of the presentation of a claim against the decedent's estate in the probate court, is sufficient."

Since the only purpose of notice is to advise the party of the hearing, notice may be waived, and appearance at the hearing without objection is equivalent to such waiver. And there can be no distinction between executors and administrators in this respect. While it is true that in many matters the joint action of all the representatives of an estate is essential, the presentation of a claim against the estate to one of them is by the law of many states sufficient. 8 A. & E. Encycl. of L. § 1074. This is for the reason that all the executors are regarded in law as one person, and as having joint and entire authority over the whole estate, so that the act of any one of them in respect to its administration is the act of all. The decision in Clark's Adm'rs v. Parkville & G. R. R. Co., supra, has furnished the basis of probate procedure in such cases since 1865, without legislative intervention; and it should not now be disturbed, even if its doctrine were not entirely satisfactory. Since, under its authority, notice to one representative is sufficient to bind the estate, it must follow that the appearance and consent of one alone is likewise sufficient.

The judgment of the district court is therefore affirmed.

note, joined in by a second executor, but against the objection of the third executor. To a bill brought by the administrator of the son's estate against the executors of the father's estate, the protesting executor pleaded the statute of limitations. The court decided that, because the executor who was next of kin to the son was thereby to profit out of the acknowledgment, it could be set aside by any one interested, even if otherwise the acknowledgment would be all right. The court pointed out that "it has never been decided in Massachusetts that a payment made by one of two executors against the objection of his coexecutor upon a note which was barred by the statute in the lifetime of the testator would revive the note, nor has it been so decided in England. The Lords Justices of the Court of Appeal, in a late case, preferred to leave this subject open for future consideration. Midgly v. Midgly, [1893] 3 Ch. 282."

[10] Part only of the opinion is given.

HALL v. GREENE.

(Supreme Court of Rhode Island, 1902. 24 R. I. 286, 52 Atl. 1087.)

DOUGLAS, J. In this case the plaintiff, as administrator, sued the defendant in assumpsit for the price of a chattel sold by his intestate. Defendant pleaded in set-off a claim against the intestate of a character which would have been available in set-off if the action had been brought by the intestate in his lifetime. To the introduction of evidence in support of this claim the plaintiff objected on the ground that the claim had not been presented to the administrator for allowance or rejection as required by statute. The objection was allowed by the court, the evidence was excluded, and the defendant duly excepted to the ruling, and now alleges it as ground for a new trial.

We think the ruling would have been correct if it had been made up on a replication to the plea. The right of set-off at common law is purely statutory. The effect of the statute is to allow the trial together of two cross-actions between the same parties, and each claim must stand or fall upon its own merits. Our statute does not permit this unless the claim presented in set-off is one which the holder may presently sue in his own name. In the case of mutual claims between an insolvent estate and a creditor or a debtor, as we have recently decided in the case of Troup v. Bank, 24 R. I. 377, 53 Atl. 122, set-off takes place by operation of law upon principles of equity, and independently of the statute; but the considerations which govern in that case have no application to an estate which is solvent. Upon a similar provision to the one we are considering, the Supreme Court of New Hampshire held that a claim not presented to the administrator could not be allowed in set-off. Jones v. Jones, 21 N. H. 219.

We think, however, that by joining issue upon the plea in set-off the plaintiff has waived his rights to the objection. The defendant's claim, so pleaded, is to all intents and purposes an action against the administrator. It was prematurely brought, and, if the administrator had pleaded the fact, must have been abated. Instead of urging the matter in abatement, he joins issue and goes to trial on the merits of the claim. The question which came before the court was then one of evidence, and it is not contended that the evidence offered was not pertinent to the issue joined. It was too late to change the pleadings after the case had been opened to the jury.

New trial granted.[11]

[11] See Moore v. Gould, 151 Cal. 723, 91 Pac. 616 (1907); Cohn v. Carter, 92 Miss. 627, 46 South. 60 (1908). In Helms v. Harclerode, 65 Kan. 736, 70 Pac. 866 (1902), it is held that, where a claim is allowed against an insolvent estate in favor of a debtor of the estate, the debtor, when sued for his debt, may set off the full amount of his allowed claim. But in Van Dusen v. Topeka Woolen Mill Co., 74 Kan. 437, 87 Pac. 74 (1906), it is held that a debtor to an insolvent estate may not set off against his debt a claim against the estate bought by him at a discount after decedent's death.

MUTUAL BENEFIT LIFE INS. CO. v. HOWELL.

(Court of Chancery of New Jersey, 1880. 32 N. J. Eq. 146.)

Bill to foreclose. On final hearing on bill and answer.

THE CHANCELLOR [THEODORE RUNYON]. The question presented for decision is, whether the complainant is entitled to a decree for deficiency against the administrators of the estate of John S. Smith, deceased. The liability of the estate to a decree for deficiency is based on an assumption, by the intestate, of the complainant's mortgage, in a deed from the mortgagor to him for the mortgaged premises, and a bond given to the complainant by the intestate, with condition to pay to the complainant the mortgage debt in one year from the date of the bond, February 24, 1876, with interest. The intestate died in March, 1878, and the bill was filed in November of that year. The intestate, at the time of his death, lived in Morris county. The administrators took an order, April 6, 1878, to limit creditors in nine months from that date. The nine months expired in January, 1879.

The complainant has never presented any claim against the estate, unless the filing of the bill for foreclosure, praying a decree for deficiency, may be so considered.

By their answer, the defendants claim that they have complied with the requisites of the statute as to publication of the order, and that the complainant, not having presented its claim, according to law, within the time limited by the order, is barred of all action against them therefor. The complainant might have presented its claim under the order to limit creditors. It had the intestate's bond, a legal liability for the payment of the debt, in addition to the equitable claim arising upon the assumption. The filing of the bill cannot be regarded as equivalent to doing so.

The statute provides that when an order to bring in debts and

On set-off or counterclaim as affecting estates of deceased persons, see 8 Prob. Rep. Ann. 331, note.

"A further objection is made that the items set out in the answer as a payment on the note were never presented to the probate court as a claim against the estate of the deceased, and allowed by the court. If these items were pleaded as a set-off, this objection would be good; but such is not the case. The items [four for work and labor at an agreed price] are set up as payments made upon the note, it being specifically alleged that Hass [plaintiff's intestate] agreed to credit these several items on the note as a payment of so much cash." Duffie, C., in Parker v. Wells, 68 Neb. 647, 649, 94 N. W. 717, 718 (1903). See Printy v. Cahill, 235 Ill. 534, 85 N. E. 753 (1908).

While courts of law can recognize only claims presented in time, it has been held that an allowance by the probate court of a claim presented after the time fixed by statute is not an error going to the jurisdiction. O'Brien v. Larson, 71 Minn. 371, 74 N. W. 148 (1898).

On whether an executor or administrator is in such privity with a legatee, distributee, or creditor that he may assert a personal defense of the latter to a claim against the estate, see 8 L. R. A. (N. S.) 212, note.

On the binding effect on the administrator of the settlement by the sole distributee of a claim belonging to the estate, see 11 L. R. A. (N. S.) 148.

claims against the estate of any decedent shall be made, all claims and demands of the creditors of the deceased shall be presented in writing, specifying the amount claimed and the particulars of the claim, and shall be verified under oath, or the bringing in of the same shall be of no effect. Rev. p. 764. It also provides that any creditor who shall have neglected to bring in his debt, demand or claim within the time limited, shall, by the final decree to be made after the expiration of the limited period, be forever barred of his action against the executor or administrator, unless, after the final settlement of the account of the executor or administrator, such creditor shall find some other estate not accounted for; in which case he shall be entitled to have his debt, demand or claim paid thereout, or to a ratable proportion thereof in case other creditors shall be barred of their debts, demands or claims. Id.

Not having complied with the provisions of the law, the complainant is absolutely barred of its action against the administrators. Ryan v. Flanagan's Adm'x, 38 N. J. Law, 161.[12]

Where an executor or administrator is sued in a foreclosure suit for deficiency, unless it appears to be clear that a decree should be made against him, requiring him to pay the deficiency as soon as it shall have been ascertained, and consequently that no rights of other creditors will be prejudiced by such decree and the execution thereof, there will be no decree against him. The decree, if made at all, unless where the executor or administrator is liable at law or in equity to the payment of the deficiency, will be for the payment of the deficiency only in a due course of administration. The statute (Rev. p. 119) authorizes this court to make a decree for deficiency against any party to the suit who is liable at law or in equity for the payment thereof, and unless the executors or administrator is liable at law or in equity to pay the deficiency, there will be no decree. Leonard v. Morris, 9 Paige (N. Y.) 90; Jones on Mort. § 1717.

Of course, where it appears that the action against the executor or administrator is barred, no decree will be made against him. Rhodes v. Evans, Clarke's Ch. (N. Y.) 169.

There will be none in this case.[13]

[12] But in Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723 (1908), it was held that the commencement of a suit by the filing of a verified complaint containing all the averments required in a presented claim and the service of the complaint upon the executors within the time fixed for presenting claims operated as a presentation of the claim. Compare Moss v. Mosley, 148 Ala. 168, 41 South. 1012 (1906). The cases on the point are collected in 14 Am. & Eng. Ann. Cas. 931, note.

[13] On the effect on the mortgage of a failure to present a claim, see Townsend v. Thompson, 24 Colo. 411, 51 Pac. 433 (1897); Athearn v. Ryan, 154 Cal. 554, 98 Pac. 390 (1908). Kirman v. Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090 (1900); Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344 (1903). But see Bush v. Adams, 22 Fla. 177 (1886).

Extent of Claim of Secured Creditor Having Insufficient Security. —"Now the chief thing that we have to notice in this region is an old rule

THOMAS v. CHAMBERLAIN.

(Supreme Court of Ohio, 1883. 39 Ohio St. 112.)

McILVAINE, J.[14] * * * The only question which remains to be considered, as arising upon the demurrer to the sixth defense, as it appears to us, is that the plaintiff's claim was not allowed by Thomas as executor of Truex, within the period of four years after his giving bond as such executor.

During the whole of this period Thomas was executor of the creditor as well as of the debtor estate. In such double relation he could

of equity about the rights of a creditor who has a security, but an insufficient security, for his debt. A. dies owing X £2,000, and his debt is secured by a mortgage of Blackacre. X. realizes his security. He sells Blackacre, but the sale produces only £1,000. Well, of course, X. is still entitled to be paid another £1,000, and if A.'s estate is sufficient for the payment of all his debts then X. will get that other £1,000. But suppose that A.'s estate is insolvent; X. will certainly be entitled to something besides the £1,000 that he got out of Blackacre. It would, I think, be natural to say that X.'s right is to prove against the testator's estate a debt of £1,000, and take a dividend, whatever it may be, say five shillings in the pound, proportional to that debt of £1,000; for £1,000 is what is due to him after Blackacre has been sold. Now that was the rule to which the Court of Bankruptcy came in the administration of the insolvent estates of living persons. Its rule was this: The creditor with an insufficient security may do one of two things: He may abandon his security (abandon Blackacre) and prove for his whole debt (prove for £2,000), or he may realize his security and prove for what still remains due to him after such realization. Thus in the case I have put he may pocket £1,000, the price of Blackacre, and then claim a dividend on the other £1,000 which still remains due to him. But the Court of Chancery in its administration of the estates of dead persons came to another rule, usually known as the rule in Mason v. Bogg [(1837) 2 My. & Cr. 443]. The mortgagee may realize his security, and may also prove against the general estate for the whole of his debt, provided always that he is not to get more than twenty shillings in the pound. Thus in our case X. might keep the £1,000 that he gets from the sale of Blackacre, and then he may also prove against the general estate of the dead man for the whole £2,000; but, of course, he is not to get in all more than the whole debt, the whole £2,000 that is due to him. This rule may seem to you unjust, and it has seemed unjust to Parliament. It seems to favor the secured creditor unduly at the expense of unsecured creditors. However you can see that there was a certain logic in it. The mortgagee has two distinct rights, the right in personam, the personal right against the debtor, and the real right, the right in Blackacre. Why should he not use both of these? Why should the fact that he has used one of them hamper him when he desires to make good the other? He sells Blackacre. Well and good; but the dead man owed him £2,000. Why should he not prove against the dead man's estate for the whole of this debt? However, it is needless now to consider whether or no there was much justice in this reasoning; for a section of the judicature act of 1875—section 10—declared in effect that in the administration of the estates of dead persons the bankruptcy rule was to prevail as between the secured and the unsecured creditors." Maitland's Equity and the Forms of Action at Common Law, 194, 195.

For the conflict of authority in the United States on this point, see 2

[14] The statement of facts is omitted, and part only of the opinion is given

not deal or contract with himself, but whenever funds belonging to the debtor estate and applicable to the payment of the creditor estate came into his hands, he was bound to treat the same as assets of the creditor estate, to the extent of the indebtedness. If mistakes occur in making transfer of such accounts, they may be corrected on settlement of his final accounts with the probate court. No formal "allowance" of the claim was necessary; but if it were, the credits endorsed upon the notes during the double relation, sufficiently show that such allowance was made.

We find no error in the record of the court of common pleas, for which the judgment of that court should have been reversed.[15]

Woerner's American Law of Administration (2d Ed.) § 408. Local statutes should be consulted.

If in the case of Mutual Benefit Life Ins. Co. v. Howell, supra, there had been no bond, the court would probably have held the claim contingent and not provable until the existence of a deficiency was established. Terhune v. White, 34 N. J. Eq. 98 (1881).

CONTINGENT CLAIMS.—On contingent claims, see 2 Woerner's American Law of Administration (2d Ed.) § 394; 58 L. R. A. 82, note. See, also, Zollickoffer v. Seth, reported post, p. 692. That in some states contingent claims must be presented within the time for presenting other claims, or they will be barred, though the estate has not been closed, see Barto v. Stewart, 21 Wash. 605, 59 Pac. 480 (1899). If a contingent claim becomes absolute within the time for presenting claims, and is not presented, it is barred. Jorgenson v. Larson, 85 Minn. 134, 88 N. W. 439 (1901). That a claim payable at the death of a particular person is not contingent, see Farris v. Stoutz, 78 Ala. 130 (1884); Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 Atl. 364 (1903). In the latter case it is said (75 Vt., at page 269, 55 Atl., at page 366): "The fact that the time of payment is uncertain does not make a claim contingent when, as in this case, the time of payment is sure to arrive at some future day. A contingent claim, within the meaning of V. S. 2517, is one that cannot be proved as a debt before the commissioners, or allowed by them, because the liability is dependent upon some future event which may or may not happen, and therefore cannot be determined within the time allowed for proving claims before the commissioners." So, also, the mere fact that an accounting is necessary to determine the amount due does not make the claim contingent. Davis v. Davis, 137 Wis. 610, 119 N. W. 334 (1909).

[15] But see State v. Bidlingmaier, 26 Mo. 483 (1858). See Brown v. Green, 181 Mass. 109, 63 N. E. 2, 92 Am. St. Rep. 404 (1902), which holds that the executor need not present his own claim against the estate within the time fixed for presentation of claims, but may retain assets to pay it and account accordingly. See, also, Sanderson's Adm'rs v. Sanderson, 17 Fla. 820 (1880). In some states the matter is governed by special statute. See Farrow v. Mevin, 44 Or. 496, 75 Pac. 711 (1904). In still others the administrator must present a claim to himself or be barred, even though there is no statute specifically mentioning his case. In re Bright's Estate, 157 Mich. 220, 121 N. W. 718 (1909). In In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710 (1906), the court refused to relieve the administrator from his failure to file his claim through lack of knowledge that it was required. The court said: "His mistake was purely one of law, and due wholly to his own neglect. His only excuse is that he did not think it necessary to file claims. Surely that is not an equitable circumstance which will justify the relief sought." It should be noted that "the common-law rule allowing executors and administrators to retain for their own debts in preference to other creditors is repudiated, it is believed, in all the states." 2 Woerner's American Law of Administra-

SECTION 3.—PRIORITIES BETWEEN CLAIMS

"At common law the personal representative was required to pay the claims against the estate of the decedent in the following order: (1) The necessary funeral expenses, the extent of which was fixed by the condition and rank of the decedent; (2) the necessary expenses of the administration; (3) debts of record due to the crown; (4) debts of record due to subjects, which included judgments, decrees, statutes, and recognizances; (5) debts by specialty, founded upon a valuable consideration, and debts for rent; (6) simple contract debts, based upon valuable consideration; (7) voluntary bonds or covenants; (8) other voluntary debts." 8 Am. & Eng. Ency. Law (2d Ed.) 1034.[16]

LEWIS et al v. RUTHERFORD.

(Supreme Court of Arkansas, 1903. 71 Ark. 218, 72 S. W. 373.)

Petition by Georgiana A. Lewis and others for an order requiring R. B. Rutherford, administrator of the ancillary estate of G. W. Lewis, deceased, to pay over to the administratrix of the principal estate, in another state, so much of the assets in his hands as would give all creditors of the deceased an equal per cent. of their debts. From an order dismissing the petition, the petitioners appeal. Affirmed.

Appellants presented to the probate court of Sebastian county a petition in which they state: * * * That the probate court of the Ft. Smith district of Sebastian county, Arkansas, had allowed $3,676.16 against the ancillary estate; that the probate court of Barry county, Missouri, had allowed debts amounting to $6,789.04 against the principal estate, and the assets in the hands of the primary administratrix, which included all of the property belonging to the estate, aside from that in the hands of said R. B. Rutherford, amounted to $868.53. * * * Petitioners asked that out of the assets in the hands of R. B. Rutherford, ancillary administrator, a sufficient amount

tion (2d Ed.) § 395. On the common-law right of retainer, see Davies v. Parry [1899] 1 Ch. 602.

On whether a provision in a will for the payment of a debt dispenses with the necessity of presenting or proving the claim, see 15 Am. & Eng. Ann. Cas. 624, note.

THE UNITED STATES AS CLAIMANT.—In U. S. v. Bean (D. C.) 120 Fed. 719 (1903), it was held that the United States, unless specially named, is not governed by the state statute requiring claims to be first presented to the executor or administrator for allowance before action can be maintained upon them. See, also, Pond v. Dougherty, 6 Cal. App. 686, 92 Pac. 1035 (1907).

[16] In the United States the order of priority has been much simplified by statutes. The local statutes should be consulted.

be set aside and turned over to G. A. Lewis, the primary administratrix, to give to all of the lawful creditors an equal per cent. of their debts.

To this petition R. B. Rutherford interposed the following demurrer, to wit: "Now comes administrator herein, and demurs to the petition of Georgiana Lewis et al., and for cause thereof says that * * * it appears from said petition that petitioners reside in the state of Missouri, in which state the primary or domiciliary administration upon the estate of the said G. W. Lewis, deceased, is pending, and that the defendant administrator herein is the ancillary administrator of the said estate in Arkansas, and that there are debts due creditors residing in this state from the said estate, more than there are assets in this administration sufficient to pay off and discharge, so that, after the payment of the claims of the resident creditors, there will not be any estate remaining in the hands of this administrator."

The court sustained the demurrer and rendered judgment dismissing the petition.

WOOD, J.[17] * * * There are authorities which hold that it is the duty of an ancillary administrator to retain the funds in his hands for a pro rata distribution, according to the laws of the state of his administration, among the citizens thereof, having regard to all the assets, both in the hands of the principal administrator and the ancillary administrator, and having regard, also, to the whole of the debts which by the laws of either state are payable out of those assets. Dawes, Judge, etc., v. Head, 3 Pick. (Mass.) 128; Davis v. Estey, 8 Pick. (Mass.) 476; Miner v. Austin, 45 Iowa, 221, 24 Am. Rep. 763. Other authorities hold that it is the duty of the ancillary administrator to satisfy in full the creditors of his jurisdiction, even though the principal administration be insolvent. In other words, that it is the duty of the ancillary administrator to protect only home creditors. Wharton, Con. Laws, § 640; Minor, Con. Law, p. 250; Smith v. Bank, 5 Pet. 518, 8 L. Ed. 212.

Our own court, in Shegogg v. Perkins, 34 Ark. 117, said: "The only duty devolving upon the [ancillary] administrator was to collect the assets here, and to appropriate so much of the avails of the same to the payment of debts due to our citizens as would be authorized by the general solvency or insolvency of the estate of the deceased, and remit the balance to the place of primary administration." This seems to recognize the former of the above views as correct. But this language of our court was dictum; the question in Shegogg v. Perkins being whether the ancillary administrator in Arkansas could allow the claim of a Tennessee creditor, as in the case of a local or Arkansas creditor. The question of insolvency was not involved. We are not called upon in this proceeding to decide between these con-

[17] The statement of facts is abbreviated, and part only of the opinion is given.

flicting views. Because, even if it be conceded that the view as expressed in Shegogg v. Perkins as to the duty of the ancillary administrator be correct, still we are clearly of the opinion that the probate court, with its limited jurisdiction, is not the forum to determine the question of the general solvency or insolvency of the estate of the deceased, and the questions of the priorities and preferences under the varying laws of the different jurisdictions that might arise between the creditors. The rules of procedure and the machinery of the probate court are not sufficient for this purpose. * * *

We are not called upon to decide whether appellants would have rights in a court of equity, and we do not decide that question. Affirmed.[18]

SECTION 4.—PRIORITIES OF CREDITORS OVER LEGATEES AND NEXT OF KIN

SIMMONS v. BOLLAND.

(High Court of Chancery, 1817. 3 Mer. 547.)

By indenture of lease dated the 23d of July 1798, the mayor and commonalty of Canterbury demised to Simmons (one of the aldermen of their corporation), his executors, administrators, etc., for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, etc., on nonperformance of all or any of which covenants, it was declared that the lease should be void, and a power of re-entry was reserved.

Simmons, the lessee, by his will, gave all his real estates, and all his leaseholds and personal estate, to the defendant Bolland and another (whom he also appointed his executors), upon trust to sell; and after payment thereout of debts and legacies, to invest the produce in their names upon certain trusts, subject to which he gave the entire residue

[18] In Ramsay v. Ramsay, 196 Ill. 179, 63 N. E. 618 (1902), it was held that creditors of an insolvent Illinois decedent, who had received part of their claims from the proceeds of property of the estate in Missouri, must deduct such amount before sharing in the assets in Illinois. The Missouri and Illinois statutes on the matter are there considered. A nonresident creditor will be allowed, either through comity (McKee v. Dodd, 152 Cal. 637, 93 Pac. 854, 14 L. R. A. [N. S.] 780, 125 Am. St. Rep. 82 [1908]), or of right, under the privileges and immunities clause of the United States Constitution (Goodall v. Marshall, 11 N. H. 88, 95, 35 Am. Dec. 472 [1840]), to present his claim, whether the administration is primary or ancillary. Compare In re Colburn's Estate, 153 Mich. 206, 116 N. W. 986, 126 Am. St. Rep. 479 (1908). That claims are barred under the statutes of nonclaim of one state is immaterial, if they are not barred under such statutes of the state where the claims are presented. Wilson v. Hartford Fire Ins. Co., 164 Fed. 817, 90 C. C. A. 593, 19 L. R. A. (N. S.) 553 (1908). See, also, 19 L. R. A. (N. S.) 553, note.

of his estate to the plaintiff on his attainment of the age of twenty-five years.

The testator died in 1807, leaving the plaintiff his son, then a minor. The trustees and executors proved the will, possessed themselves of the whole of the testator's estate real and personal, and paid the debts and legacies without resorting to a sale of the real estate or of the leaseholds, into the possession of which (including the premises demised by the said indenture of lease) the plaintiff, on his attaining twenty-five, entered; at which time also, the entire residue of the personal estate was transferred to him by the executors, except a bond for £1,000 from the mayor and commonalty of Canterbury, under their common seal, to the testator; and a sum of £800, 5 per cents., which were still retained by them out of the surplus, and for the recovery of which the present bill was filed.

To this bill the defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, "for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of Simmons deceased, in respect of rent due or thereafter to accrue due for the premises demised by the said indenture, or of the present or any future breach or nonperformance of any of the covenants therein contained, the payment of which rent, and performance of which covenants, the defendant was advised he was liable to under the said indenture," and had actually then lately received a notice to that effect from the corporation. He at the same time admitted that there were then no subsisting breaches of covenant in respect of which he was so liable, and that no rent was then due or in arrear for the premises, but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the corporation also extended.

The Master of the Rolls [Sir Wm. Grant]. The equitable relief sought in this case depends upon a legal question, whether an executor can safely make payment of legacies, or deliver over a residue while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case (of Eeles v. Lambert) reported both by Styles and by Aleyn (Styles, 37, 54, 73; Aleyn, 38), the ultimate judgment in which is not, however, stated by either. There is also a case of Nector and Sharp v. Gennet, in Cro. Eliz. 466, where the same question arose, though in a different shape. A legatee sued in the ecclesiastical court for his legacy. The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the sheriffs on an action for an escape; and the executors had therefore nothing in their hands to answer the demand. This plea was disallowed, whereupon a pro-

hibition was sued, which being demurred to, the defendant prayed a consultation.

Upon this the principal question was, whether the escape was such that the sheriff was suable in respect of it? for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered, so there was no inconvenience to any. To which the whole court agreed, and determined that it was no plea, unless the obligation were forfeited. Coke said, "The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty maintenant, which is in the condition (as 9 Edw. IV, 12). But otherwise it is, where a statute or obligation is for the performance of covenants, or to do a collateral thing. There, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie in perpetuum, and so no will should be performed." The majority of the judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual court to proceed according to their own established course—namely, to compel the legatee to give security to refund the legacy, in case of the executors becoming afterwards liable to be sued upon the bond. In the argument of Eeles v. Lambert, this case is noticed by Rolle, Justice: "It was Nector and Sharp's Case, 38 Eliz. that legacies ought to be paid conditionally, viz. to be restored if the covenant should be broken." Styles, 56.

In Hawkins v. Day, Amb. 160, Lord Hardwicke makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of Ambler's report of this case; for his statement is found to correspond with the register's book, and although, in the order overruling the exceptions, particular legacies are specified, yet it appears, by a reference which has been made to the master's report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord Hardwicke stating the question with respect to them to be, "Whether payment of the assets, before there was any breach of the condition, ought to be allowed as a good administration of the effects." See note annexed.[19]

In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the corporation of Canterbury, or protect the executor against their demand,

[19] The note referred to is omitted.

if the bond should hereafter be forfeited. All that I can do, is to order the funds to be made over on the plaintiff giving a sufficient indemnity; and it must be referred to the master to settle the terms of such security.

In re KING.

MELLOR v. SMITH AUSTRALIAN LAND MORTGAGE & AGENCY CO.

(Supreme Court of Judicature, Chancery Division. [1907] 1 Ch. 72.)

NEVILLE, J.[20] In this case the executors seek the direction of the court to distribute the estate among the residuary legatees notwithstanding the claim of a limited company in respect of unpaid shares, no calls having been made. It appears to be the practice to direct such distribution notwithstanding the existence of contingent claims, and, as the law stands, I think it is clear that the order of the court in such a case exonerates the executors from ultimate liability to the creditor. The practice appears to have grown up gradually and in a manner which is not to my mind altogether satisfactory. One cannot help seeing that the rights of absent parties of whose claim the court has notice may be prejudicially affected by the order. Nor are the authorities themselves in a very satisfactory state, but I think the outcome is reasonably clear.

The first case I have been referred to is Fletcher v. Stevenson, 3 Hare, 360, before Wigram, V. C. In that case the Vice Chancellor directed that the whole of the residuary estate of the testator and the income should be retained for the purpose of providing a fund to satisfy, if necessary, future claims for rent. The Vice Chancellor says this (3 Hare, 370): "The widow's claim is opposed by two parties: First, by the executor; and, secondly, by the legatees in remainder. So far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the court; but in considering what degree of protection is due to the absent covenantee, I am bound to consider whether the court, taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands." That is the ground on which the Vice Chancellor refused to part with the fund, and I must say that what the Vice Chancellor says seems to me of very great force.

The next case cited in which the matter came before the court is Dean v. Allen, 20 Beav. 1. The side note is: "Where an estate is administered and the residue is paid over under an order of the court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law. The executors of a lessee held entitled to

[20] The statement of facts is omitted, and the opinion on the merits only is given.

no further indemnity against the covenants than the personal indemnity of the residuary legatees." That case is a clear authority upon the point that the direction of the court exonerates the executors from liability to the creditor, but it is not very satisfactory because it provides for indemnity to the trustees, and does not point out or apparently recognize any inconsistency between the doctrine that the executors are entirely exonerated from liability and the provision of indemnity for them.

The point again came before Sir John Romilly in Waller v. Barrett, 24 Beav. 413, and there the Master of the Rolls gives reasons for what he states to be the practice which are at all events intelligible. He reiterates the doctrine of exoneration. [His Lordship read the headnote to that case, and continued:] The Master of the Rolls says (24 Beav. 418): "I am at a loss to conceive on what principle a debt which may arise hereafter, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time, he may be ignorant of the whole proceedings, and yet, if he do not come in and claim, his only remedy in this court is against the legatees. In the case of March v. Russell (1837) 3 My. & Cr. 31, 41, Lord Cottenham made this observation: 'Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee.' I hold that this, in fact, is the principle which governs these cases, that it is for the purpose of giving a greater degree of security to the executor (in case a creditor should arise thereafter), that the court requires what is called 'an indemnity to the executor' to be given; but if he has stated the facts to the court, and has acted under its direction, I apprehend that his indemnity is complete and perfect, so far as he is concerned."

That is an intelligible account of the origin of the practice. I am surprised that Lord Romilly should have professed himself to be at a loss to conceive on what principle a contingent debt can be differentiated from an existing debt; but he does class the two together and declare that the order of the court exonerates the executor on distribution of the assets. Further, one cannot help feeling that the reason given for the provision of the indemnity is unsatisfactory, because it is curious that an indemnity of this kind should be held to give a greater degree of security to the executor than the order of the court, which exonerates him altogether. However, there it is, and that is something upon which one can proceed, whether the grounds upon which it is founded, as stated by the learned judge, commend themselves to one's ideas of the general practice of the court or not.

The next two cases to which I was referred are both before Kindersley, V. C. In the first, Smith v. Smith, 1 Dr. & Sm. 384, the doctrine of exoneration was referred to, and it was held the executors were not in that case entitled to an indemnity, and the Vice Chancellor says (1 Dr. & Sm. 387): "Supposing there has been no dealing with the leaseholds by the executors, would they have been now entitled to any indemnity? In following the previous decisions, I have held that executors have such right; but I concur with the Master of the Rolls in thinking that where an executor fairly represents everything to the court the decree, directing him to deal with and distribute the property, must operate as a complete indemnity to him; and that therefore an executor cannot need any other indemnity. It has, however, been suggested, that there ought to be a fund set apart by way of indemnity, not for the benefit of the executor, but for the benefit of the lessor, in case of there being at any future time a breach of covenant. Now if the lessor is entitled to any such equity as this, it would seem to follow that he might come to this court to assert such equity, and to ask the court to set apart a sum of money out of the testator's assets, to provide for the event of a future breach of covenant; for which he might be entitled to recover damages. But it has been held that a lessor cannot be heard in this court to maintain any such right. In truth the whole doctrine on the subject is in a very unsatisfactory state; and does not seem to be founded on sound principles."

The case came again before the same Vice Chancellor in Dodson v. Sammell, 1 Dr. & Sm. 575. In that case a fund which had been set apart to indemnify executors was ordered to be paid out to the residuary legatee, such indemnity since the passing of Lord St. Leonards' Act (22 & 23 Vict. c. 35) being no longer necessary as a protection to the executor The Vice Chancellor said (1 Dr. & Sm. 578): "With respect to the other ground, that it is required for the benefit of the lessor, it is true that in Fletcher v. Stevenson, 3 Hare, 360, Wigram, V. C., thought that, although the decree of the court would be a sufficient indemnity to the executor, it was right to set apart a sufficient part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now, if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in King v. Malcott, 9 Hare, 692, Turner, V. C., decided that there was no such equity." With great respect, I venture to think that the inference which the learned Vice Chancellor draws in that case is not a necessary inference, and that the reason given by Wigram, V. C., for retaining a security for the contingent creditor was an intelligible reason which was not open to the observation made by Kindersley, V. C., in that case. However, from that time on it seems to have been the practice not to retain any part of the assets.

Then after a considerable number of years—I have not been referred to any case decided between 1861 and 1904—the case came before the late Byrne, J., in In re Nixon (1904) 1 Ch. 638. The headnote in that case is: "On making an order for the distribution of the estate of a testator amongst his residuary legatees, the court will not set aside any part of his assets to indemnify his executors against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the executors and the lessors." That I understand to apply to all cases where there is not a personal liability on the part of the executors to pay out of their own moneys the claim of the creditor. The learned judge went through the cases and came to the conclusion stated in the headnote, and I think that, having regard to the authorities, it is necessary for me to proceed on the same footing.

It is pointed out in one of the cases that the exoneration must, or at all events may, only operate in the case of an administration action. There may be a distinction in the protection afforded by a direction of the court taken under Order LV, R. 3, without administration. It is obvious that the court cannot direct distribution of the estate so long as it is not satisfied that there are no longer any immediate claims outstanding. I think, therefore, there should be an inquiry as to debts.

NORMAN v. BALDRY.

(High Court of Chancery, 1834. 6 Sim. 621.)

On the marriage of William Baldry with Ann Freston, he, together with Simon Baldry, executed a joint and several bond, dated the 7th of October, 1802, to W. Lewis, conditioned for the payment, by the heirs, executors or administrators of William Baldry, within three months after his decease, of £490 to Ann Freston, in case she should survive him; but, in case she should die in his lifetime, then for the payment by him, of £200 within six months after the death of Ann Freston, to the persons therein named.

Simon Baldry died in March, 1820. Ann Baldry died in April, 1831, leaving her husband her surviving.

William Baldry having become insolvent, the persons entitled to the £200 under the bond, filed, in 1832, a creditor's bill against the executors of Simon Baldry.

The executors, in their answer, said that they had applied the whole of Simon Baldry's personal estate in payment of his debts and legacies, and that they never heard of the bond until October, 1831.

THE VICE CHANCELLOR [SIR LANCELOT SHADWELL] said that he had always understood the law to be that an executor who had paid simple contract creditors of his testator, a bond being in existence but not then payable, ought to be allowed those payments; but that an ex-

ecutor was liable, if he paid the legatees, notwithstanding he had no notice of the bond (see Hawkins v. Day, Amb. 160); and that he was not disposed to agree to what was attributed to Lord Kenyon in the case cited.[21]

SECTION 5.—EXECUTORS DE SON TORT

EMERY v. BERRY.

(Superior Court of Judicature of New Hampshire, 1854. 28 N. H. 473, 61 Am. Dec. 622.)

EASTMAN, J.* In examining the questions presented by this case, we shall pursue the order taken in the argument, and consider, first, the ruling of the court by which a verdict was taken for the defendant upon the issue to the jury.

It may be stated, in general terms, that at common law an executor de son tort is one, who, without any authority from the deceased or the court of probate, does such acts as belong to the office of an executor or administrator; and it is said that all acts of acquisition, transferring or possessing of the estate of the deceased, will make an executor de son tort, because these are the only indicia by which creditors know against whom to bring their actions. 2 Bac. Abr. 387, and authorities there cited.

Our statute provides that "if any person shall unlawfully intermeddle with, embezzle, alienate, waste or destroy any of the personal estate of a deceased person, he shall stand chargeable and be liable to the actions of the creditors and others aggrieved, as executor in his own wrong, to double the value of the estate so intermeddled with, embezzled, alienated, wasted or destroyed." Rev. St. c. 158, § 15.

[21] That case was The Governor and Company of the Chelsea Waterworks v. Cowper, 1 Espin. N. P. C. 275 (1795).

In Daniel v. Baldwin, 148 Ala. 292, 40 South. 421 (1906), an administrator, without getting an order of court directing him to do so, distributed the estate. An infant had a claim of which the administrator knew nothing, and by statute had till 12 months after attaining majority to present it. The infant presented the claim within that time, and the administrator and his sureties were held liable.

In Hanna v. Palmer, 6 Colo. 156, 45 Am. Rep. 524 (1882), where the question was whether a widow, on renouncing the will, took under the Colorado statute one-half the estate of her husband free from his debts, the court said: "If she elects to take under the will, it will not be pretended that her legacy is exempt from the debts of the testator; and upon renouncing the will she takes her legal moiety, not as dower, nor in lieu of dower, but in lieu of the provisions of the will, and impliedly subject to the same liabilities respecting the debts of the deceased." 6 Colo. 161, 45 Am. Rep. 524.

So far as an administrator has paid a debt of the estate with assets which he is compelled to refund to the widow, he will be subrogated to the rights of the creditor. Flowers v. Reece (Ark.) 123 S. W. 773 (1909).

* The statement of facts is omitted.

What precise acts shall be deemed an intermeddling, so as to charge a person as executor in his own wrong, has never, so far as we are advised, been directly passed upon by the courts of this state. The question has incidentally arisen in two or three cases, but no definite decision has been made. Pickering et al. v. Coleman, 12 N. H. 148; Leach v. Pillsbury, 15 N. H. 137. In the latter of these cases, it was said that "it seems that the single act of receiving and paying out a sum of money belonging to the estate of an intestate, will make a person an executor de son tort, so far that he may be charged as such."

If a stranger gets possession of the goods of the deceased before probate of the will, he may be charged as executor in his own wrong. Read's Case, 5 Coke, 33, b; Salk. 313, pl. 19; Dyer, 166, b; Roll. Abr. 918. And Mr. Justice Buller, in Edwards v. Harben, 2 Term, 597, says: "In short, every intermeddling after the death of the party makes the person so intermeddling an executor de son tort." And the same learned justice, in Padget v. Priest, 2 Term, 97, says: "It is clear, from all the cases, that the slightest circumstances of intermeddling will make an executor de son tort."

The case of Padget v. Priest, and the authority of Dyer, 166, b, are cited and approved by Williams, in his note 2 to Osborne v. Rogers, 1 Saund. 265.

A careful examination of the authorities will, we think, show that, as between a creditor of the deceased and a person who may intermeddle with his goods, very slight acts indeed will make him liable as executor as de son tort. Acts of necessity or humanity, such as locking up his goods, burying the corpse of the deceased, or feeding his cattle, and similar acts of charity, by which a person does not assume to have any control over the property more than others, will not constitute a person executor in his own wrong. 2 Bacon's Abr. 288; 2 Black. Com. 507; Dyer, 166.[22] But where one possesses himself of the goods of the deceased, for the purpose of taking care of them, the object of the possession must be made to appear, before he can be discharged from the responsibility arising from his possession. Hubble v. Fogartie, 3 Rich. Law (S. C.) 413, 45 Am. Dec. 775.

The best rule that occurs to us, that can be laid down upon the subject, is this: That all acts which assume any particular control over the property, without legal right shown, will make a person executor in his own wrong, as against creditors. Any act which evinces a legal

[22] "It was formerly held, with great strictness, that no one could interfere in the least with the estate of a deceased person. This was carried to such an extent that a wife has been held liable as executrix de son tort for milking the cow of her deceased husband. Gerret v. Carpenter, 2 Dyer, 166, note. But it is now determined that there are many acts which do not make one liable, such as locking up the goods of the deceased for preservation, directing the funeral and paying the expenses thereof, feeding his cattle, etc.; for these are necessary acts of kindness and of charity." Devens, J., in Perkins v. Ladd, 114 Mass. 420, 422, 19 Am. Rep. 374 (1874).

control, by possession, direction or otherwise, will, unexplained, make him liable. And this position the authorities seem fully to sustain. 2 Bac. Abr. 387; 5 Coke, 33, b; Edwards v. Harben, 2 Term, 597; Padget v. Priest, 2 Term, 97; Campbell v. Tousey, 7 Cow. (N. Y.) 64; White v. Mann, 26 Me. 361; Wilson v. Hudson, 4 Har. (Del.) 168; Hubble v. Fogartie, 3 Rich. Law (S. C.) 413, 45 Am. Dec. 775; 1 Saund. 265, note.

Mountford v. Gibson, 4 East, 441, and the other cases cited by the defendant's counsel, will not, we think, when carefully examined, be found to conflict with these views.

The evidence, in this case, was competent to show the defendant executor in his own wrong, and liable under our statute. It tended to show that the defendant had in his possession $400, money which he had received from the estate of his son, Joseph Berry, who was an alleged debtor of the plaintiff, and who died in California. He received it through a draft on Boston, sent by a Mr. Matthews, from San Francisco. The object for which the money was sent is not stated. It was sent to the defendant, subject to no order of the deceased, or of any administrator or executor of his in California. Matthews would appear to have been acting as the friend of the deceased, and, without any administration upon the estate, to have taken upon himself to send the avails of the property of the deceased to his father, in this state.

The case finds Berry to be dead. It finds, in effect, that the $400 belongs to his estate, and that the same is money, in the hands of the defendant, in this state. It does not appear that any administrator, executor, creditor or heir in California has any right to the property, or to its control. Nor does it appear that it was sent to this state by authority of any will or the decree of any probate court. Neither is any thing disclosed in the case by which it appears that any one in this state or elsewhere has any right to any legal control over it. It is, then, simply personal property of the deceased, in this state, in the hands of the defendant, subject to the rights or interference of no one, except as the statute shall point out. Being within our jurisdiction, under such circumstances, it may properly be administered upon in this state, for the benefit of the heirs and creditors residing there.

There has been no administration upon the estate of the deceased in this state, and the defendant is the only person shown to have intermeddled with the property here. He is the only one who has had it in his possession, and exercised control over it, and we infer from the facts stated, has declined to surrender the property or take out letters of administration upon the estate.

If the defendant desires to avoid the penalty prescribed by the statute, it seems that it may be done by his now taking out letters of administration. Shillaber v. Wyman, 15 Mass. 322.

We are the better satisfied with the conclusion to which we have arrived, as to the liability of this defendant, from comparing the sec-

tion of the statute already cited with the twelfth section of the same chapter. The latter provides that "no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond to the judge, with sufficient sureties, in such reasonable sum as he shall approve, upon condition," etc. While this section provides that no person shall intermeddle with the estate of any person deceased without giving bond, the fifteenth provides that if any person shall unlawfully intermeddle with the personal estate of any deceased person, he shall stand chargeable as executor in his own wrong. The two sections taken together would seem to show that when the legislature speak of an unlawful intermeddling, they mean all such as takes place without giving bond as administrator or executor.

Verdict set aside and new trial granted.[23]

ROHN v. ROHN.

(Supreme Court of Illinois, 1903. 204 Ill. 184, 68 N. E. 369, 98 Am. St. Rep. 185.)

CARTWRIGHT, J. Appellee, Ida Rohn, as administratrix of the estate of her deceased husband, William Rohn, Jr., recovered a judgment in the superior court of Cook county for $1,762.50 against appellant, William Rohn, father of said William Rohn, Jr., as executor de son tort of said estate, in an action on the case for negligence in failing to collect a note of $1,500 against George Wildner, which appellant had in his hands. The Branch Appellate Court for the First District affirmed the judgment.

The material facts appearing on the trial are as follows: William Rohn, Jr., was a partner of George Wildner in the manufacture of furniture in Chicago, and having long been ill with a fatal disease, he attempted to arrange his business affairs and property in view of his approaching death. He had no real estate and no debts, and was averse to having his estate probated. To carry out his arrangement he entered into a contract with Wildner for the sale of his interest in the partnership to Wildner for $8,500, on which $6,000 was to be paid in cash or securities and Wildner was to give his notes for the remainder, one for $1,000 and the other for $1,500. Wildner had

[23] In Meyrick v. Anderson, 14 Q. B. 719 (1850), it was held that the executor de son tort of a rightful executor is liable in the same manner as a rightful executor for the debt of the original testator. In Georgia, where an executor of an executor is ipso facto executor of the original estate (Jepson v. Martin, 116 Ga. 772, 43 S. E. 75 [1902]), the same doctrine holds true. See Dawson v. Callaway, 18 Ga. 573 (1855), where an executor de son tort of an executor de son tort was held as the executor de son tort of the original testator. On executors de son tort, see 98 Am. St. Rep. 190, note; 85 Am. Dec. 423, note.

$1,600 in mortgages and was going to raise $400 to make up $2,000. He arranged to borrow $2,000 from his mother and $2,000 from Rudolph Rohn, brother of the defendant, for the purpose of paying the $6,000. William Rohn, Jr., executed a bill of sale of his share of the partnership, dated September 28, 1893, and gave it to his wife, Ida Rohn, to be delivered upon compliance with the terms of sale. When the contemplated sale should be carried out his estate would amount to $11,000, which was all in personal property, and he said that he wanted to secure to his wife $5,000 of that sum and to each of his children $3,000; that he wanted to leave all his effects in the care of his father, the defendant, in whom he had perfect confidence. He died October 10, 1893, and on October 17, 1893, the defendant, in pursuance of the arrangement, took the bill of sale and delivered it to Wildner, receiving from him $6,000 and two judgment notes payable to Ida Rohn, under the name of Mrs. William Rohn, Jr., one for $1,000, due in two years, and the other for $1,500, due in three years. The $6,000 was raised by Wildner as above stated. The defendant gave to Ida Rohn, the widow, a list showing the two notes and other securities, aggregating $11,000, which was the entire estate left in his custody, as requested by the deceased. She then went with a friend and the defendant to an attorney's office, where she said that her husband was dead and it would be better to get things into proper shape in accordance with his will; that he wanted her to have $5,000 and each of the children to have $3,000, and she wanted a document drawn up to have the transaction shown in case anything should happen, and to show that defendant held the property. The attorney drew up, according to her directions, a declaration of trust, by which defendant acknowledged that he had received from his son, William Rohn, Jr., $11,000 in notes, partly secured and partly unsecured, which he held in trust for Ida Rohn and her two minor children, in the proportion of $5,000 for the former and $3,000 for each of the latter. He agreed to collect interest on all the securities and pay the same to Ida Rohn during the minority of the children; to turn over her share of $5,000 on demand, and $3,000 to each of the children when they became of age. This declaration was signed by the defendant. He attended to the collection of the principal and interest on the securities as they matured, without any compensation, under the agreement. The $1,000 note of Wildner was paid at maturity. Two annual payments of interest were made on the note of $1,500, and that note matured October 17, 1896, and was not paid when due. Defendant's brother, Rudolph Rohn, had furnished said sum of $2,000 when Wildner purchased the interest in the partnership, and the indebtedness had been increased to $3,000, for which Rudolph Rohn had taken a chattel mortgage on the property in the spring of 1896, and Wildner also owed Rudolph Rohn nearly two years' rent. In the latter part of October, 1896, the defendant and Rudolph Rohn went to Wildner, and defendant requested payment of the note to the estate. They both wanted Wildner to pay them.

and he asked for time, showing them his stock and telling them he was looking for a partner and was able to pay everybody. He asked them to wait until after the election, in November, when he would get a partner or make a stock company and would see that they were protected. There was no agreement for any extension, but neither the defendant nor Rudolph Rohn took any steps to enforce collection. In November Wildner's mother, who had loaned him $2,000 to make the purchase, entered judgment on her note. Rudolph Rohn, learning that fact, paid the judgment to her and foreclosed his chattel mortgage, leaving Wildner insolvent, and the $1,500 note could not be collected. Plaintiff was appointed administratrix of her husband's estate on January 26, 1897, and on August 13, 1897, she endorsed upon the declaration of trust a receipt for $9,500 in cash and all interest thereon to that date.

The defendant took charge of the property in entire good faith, without compensation, solely for the purpose of carrying out the wishes of his son. The only question of fact in controversy in the case was whether defendant was guilty of negligence in not entering judgment on the note and making an effort to enforce collection by that means. The arguments of counsel on both sides are directed almost exclusively to the facts, but the judgment of the Appellate Court must be treated by us as finally settling the fact that the defendant was guilty of negligence in not exercising such diligence for the collection of the note as a man of ordinary prudence would have exercised in his own affairs, and also that the loss and damage to the estate was equal to the damages assessed.

The assignments of error which we may consider relate to the giving and refusing of instructions. There were only two instructions given at the request of plaintiff, and objection is made to them on the ground that they erroneously assumed that defendant, when the note became due, occupied the position of executor de son tort of his son's estate, while the evidence showed that he acted simply as a trustee for Ida Rohn and her two children, individually. What facts will constitute an executor de son tort of an estate is a question of law for the court, but the determination of the facts, if they are in controversy, is for the jury.

In this case there was no controversy whatever as to the facts creating the relation of defendant to the estate. The defendant received all the property of the estate, consisting of $11,000 in notes and securities, of which the widow was, under the statute, entitled to one-third and the children to the balance, in equal shares. The arrangement by which the contract with Wildner had been carried out was for the benefit of the estate and in the interest of the minor children, and has not been questioned by anybody. The defendant having taken the estate into his possession and assumed its management, was bound to hold and account for it in the proportions fixed by the statute. No

doubt the widow and the defendant honestly believed that by reason of the expressed wish of the deceased his estate could be divided as they attempted to divide it, and that the property could be placed in the hands of the defendant in a trust relation, as requested by the deceased, but they were both bound to know the law, and that the deceased could not change the distribution of his estate under the statute without a will, as he attempted to do. It is true that the declaration of trust was made at the request of Ida Rohn, and that the services of defendant were performed in good faith, with no other motive than to carry out the wishes of his deceased son, but the arrangement was void in law. Ida Rohn was entitled, as widow, to one-third of the estate and the minor children each to one-third, and neither she nor defendant could increase her interest to $5,000. The parties were wrong in their supposition that the arrangement was binding upon the minor heirs, and the undisputed facts placed the defendant in the position of an executor de son tort of the estate. He was bound to exercise, so far as the estate was concerned, the same diligence in the collection of the note as if he had been a regularly appointed administrator, and there was no error in assuming that he occupied the same position and assumed the same responsibilities and liabilities as an administrator.

The court refused instructions, asked by defendant, to the effect that acts of kindness, beneficence and charity do not amount to a usurpation of the office of administrator and do not create a liability against any person. The acts done merely from kindness and charity, and for no other purpose, which do not create a liability, as we understand it, are limited to such acts as directing a funeral, payment of funeral expenses and the preservation of the estate from loss or waste, and the like, while in this case the entire estate was taken by defendant for management and distribution, including everything, in substance, that an administrator would be bound to do, but different from the provisions of the statute. The court did not err in refusing the instructions referred to.

It is further urged that the court erred in refusing to give instructions, asked by the defendant, advising the jury that if the arrangement was concurred in by the plaintiff, and the defendant held the note, with the other property, for the use and benefit of the widow and heirs of William Rohn, Jr., with the knowledge and acquiescence of the plaintiff, she would be estopped from charging him as executor de son tort, and that he would have the right to apply the note to her distributive share of the estate, which exceeded the amount of the note. We think the court was right in refusing these instructions. In law the plaintiff represented the estate, suing as administratrix, and the only judgment at law would be for or against the defendant on the alleged liability to the estate. Counsel have pointed out no method by which a set-off or counterclaim could be interposed in a suit at law or any estoppel be made effective against the plaintiff, representing the estate. A court of equity might look beyond the parties and determine

the case upon their true relations and adjust the equities of all the parties. The minor children could not be required to bear any part of the loss, and in this suit the court could not apportion it. A court of equity may assume jurisdiction of the settlement of an estate, and in this case there was nothing to adjust except the interest of the distributees. If facts existed requiring that, as between the defendant and the widow, the loss ought to be taken from her distributive share of the estate, it cannot be done in this suit, and such relief must be sought in a court of equity. Whether she, as an individual entitled to a distributive share of the estate, was in any manner responsible for his failure to collect the note is not a question in this case, and there was no error in refusing the instructions asked by defendant.

The judgment of the Appellate Court is affirmed. Judgment affirmed.[24]

ROZELL v. HARMON.

(Supreme Court of Missouri, 1891. 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 187.)

MACFARLANE, J. This suit was commenced in the circuit court of Holt county. Plaintiff was a creditor of one B. W. Ross, deceased. The suit was for the purpose of recovering the amount of the debt from defendant on the ground that he had wrongfully appropriated and converted the assets belonging to Ross' estate to his own use. Plaintiff recovered judgment in the circuit court, and defendant appealed to the Kansas City Court of Appeals, where the judgment was reversed. The case was certified to this court by the Court of Appeals on the ground that the decision rendered therein was in conflict with the decision of this court in the cases of Foster v. Nowlin, 4 Mo. 18, and Magner v. Ryan, 19 Mo. 196. The question presented by the record in this case is sufficiently stated by Judge Philips (29 Mo. App. 578) to be "whether there can be, under the probate system in this state, an executor de son tort, in so far as to authorize a single creditor of the intestate to maintain an action of trover against him, as here sought, and thereby appropriate the whole assets to the payment of his debt."

The system provided by the laws of our state for the settlement of the estates of deceased persons was evidently intended to be exclusive of all others. The Constitution provides for the establishment of a probate court in each county, which shall have jurisdiction in all matters pertaining to probate business. The laws of the state governing the procedure in the management and settlement of estates are ample and sufficient to meet any emergency that may possibly arise during administration. They provide for the appointment of ex-

[24] Compare Rougtell v. Strode, 126 Mo. App. 348, 103 S. W. 510 (1907); Tuite v. Tuite, 72 N. J. Eq. 740, 66 Atl. 1090 (1907); Grace v. Seibert, 235 Ill. 190, 85 N. E. 308, 22 L. R. A. (N. S.) 301 (1908).

ecutors and administrators, for the preservation of the property, and the collection of the debts of the estate. They also provide summary and efficient proceedings for the discovery of assets, and for their recovery from the possession of one who intermeddles with them. Under them any creditor can have an administrator appointed. Each county is provided with a public administrator, already qualified, whose duty requires him summarily to take charge of all estates in which the property is left in a situation exposed to loss or damage; and the court is given power to require him to take charge of any other estates in case of necessity. Ample provision is made for the allowance and classification of debts, converting the assets into money, and paying the debts of all creditors pro rata according to classification. Executors and administrators alone, under these laws, can recover the assets or damages for its conversion. All these provisions of the law are wholly inconsistent with the idea of executors de son tort as at common law. The administration laws of the state do not recognize the right to wrongfully administer, nor the right of one creditor to secure payment of his debt to the exclusion of others.

It is insisted by plaintiff that this state has adopted the common law, and that under the rules of the common law his action is authorized, and that the rules of the common law on this subject have not been abrogated by the statutes. It is contended that under proper rules of construction a statute in derogation of the common law must be strictly construed, and that none of its rules can be changed, except by express terms of the statute, or by necessary implication therefrom. That rule of construction is not of universal application. It depends much on the character of the law to be affected. In case of statutes penal in their character, or in derogation of common right, a strict construction is required; but in regard to statutes merely remedial in their character a fair, if not liberal, construction should be given. Oster v. Rabeneau, 46 Mo. 595; Putnam v. Ross, 46 Mo. 337; Chamberlain v. Transfer Co., 44 N. Y. 305, 4 Am. Rep. 681; Buchanan v. Smith, 43 Miss. 90.

The statute of this state, adopting the common law, itself limits or modifies the rule of construction insisted upon. Section 3117, St. 1879, provides that the common law, which is not repugnant to or inconsistent with the Constitution of this state or the statute laws in force for the time being, shall be the rule of action and decision in this state. The examination we have given shows conclusively that the statute laws of this state on the subject of administration, taken together as forming one entire system, are wholly repugnant to and inconsistent with the common law in respect to administrators de son tort. We must therefore conclude that the intention of the Legislature was to supersede the common law on that subject altogether.

The early cases of this court referred to by the Court of Appeals do seem to have recognized and acted under the common-law doctrine invoked by plaintiff in this case, but since that early day the

administration laws of the state have been greatly enlarged, the jurisdiction of the probate court extended, and the powers and duties of administrators and executors increased until there is no longer a place in the system for the inequitable, expensive, and tedious proceedings required by the rules of the common law in bringing intermeddlers to settlement. The opinion of Philips, P. J., in this case when before the court of appeals, and which is reported in 29 Mo. App. 570, with the authorities cited by him, is convincing and conclusive, and is adopted as the opinion of this court.

The judgment of the Court of Appeals is affirmed, and that of the circuit court of Holt county reversed. All the judges of this division concur.

SLATE v. HENKLE.

(Supreme Court of Oregon, 1904. 45 Or. 430, 78 Pac. 325.)

J. E. Henkle, as administrator of the estate of Francis Slate, deceased, sued Porter Slate, who had been appointed administrator under a void order, for the conversion of property of the estate. The defendant filed a complaint in the nature of a cross-bill in equity, alleging that in good faith, relying on his appointment as administrator, he had sold certain property of the estate, paid certain expenses of administration, etc. A demurrer to the cross-bill was overruled, and a decree entered requiring Henkle as administrator to pay to Slate the balance of the expenses above the proceeds of the estate property sold by Slate. Henkle appealed.

MOORE, C. J.[25] * * * Any person who, without authority, intermeddled with the estate of a decedent, by doing such acts as properly belonged to the office of an executor or administrator, was originally denominated an executor de son tort, who would be sued by the legal representative of the deceased, by a creditor of the estate, by a legatee, and, if all the debts were paid, by a distributee, and was liable to the extent of the assets which he had received. 11 Am. & Eng. Enc. Law (2d Ed.) 1342, 1351. Our statute has abolished the common-law rule which made one who officiously interfered with the property of a deceased person an executor de son tort by depriving creditors of the estate and others of the remedy which they anciently possessed of charging the intermeddler as an executor of his own wrong; but the latter is now made responsible only to the legal representative of the decedent for the value of all property taken or removed and for all injury caused by his interference therewith. B. & C. Comp. § 385; Rutherford v. Thompson, 14 Or. 236, 12 Pac. 382.

In the case at bar, the intestate, at the time of her death, not being

[25] The statement of facts is abbreviated, and part only of the opinion is given

an inhabitant of Linn county, the county court thereof had no jurisdiction of the subject-matter of her estate, and its letters of administration issued to Slate were therefore void. Slate's Estate, 40 Or. 349, 68 Pac. 399. The appointment being a nullity, Slate's possession and sale of the personal property belonging to the estate, if it were not for the immunity afforded by our statute, amending the common-law rule, would have rendered him an executor of his own wrong. 1 Abbott, Probate Law, § 407; Bradley v. Commonwealth, 31 Pa. 522. He undoubtedly had reason to believe and did believe that his appointment was valid, and, this being so, every advantage that an executor de son tort can invoke should be applied in his favor. The rule is universal that such an executor is subject to all the liabilities of an ordinary executor without being entitled to any of his privileges. 11 Am. & Eng. Enc. Law (2d Ed.) 1351; 1 Woerner, Am. Law of Administration (2d Ed.) § 193; 1 Williams, Ex'rs, *216.

The statute 43 Eliz. c. 8, so far as material herein, enacted: "That all and every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge, or any debt or duty that belonged to the intestate, * * * shall be charged and chargeable as executor of his own wrong; and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance * * * of all other payments made by him, which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm." 4 Bacon, Ab. (Bouv. Notes) 28. The enactment of this statute probably gave rise to the rule, adopted by courts, that just debts of a decedent which have been paid by an executor de son tort according to their legal priority may be set off against the amount of damages for which his intermeddling has rendered him liable. 11 Am. & Eng. Enc. Law (2d Ed.) 1353; Cook v. Sanders, 15 Rich. Law (S. C.) 63, 94 Am. Dec. 139; Bennett v. Ives, 30 Conn. 329. * * *

Williams, in his work on Executors (American Notes by Randolph & Talcott, vol. 1, p. 316), in discussing this subject, says: "With respect to the liability of an executor de son tort at the suit of the lawful representative of the deceased, there are several authorities to show that, if the rightful executor or administrator bring an action of trover or trespass, the executor de son tort may give in evidence, under the general issue, and in litigation of damages, payments made by him in the rightful course of administration, upon this ground: that the payments which are thus, as it is termed, recouped in damages, were such as the lawful executor or administrator would have been bound to make; and therefore it cannot be considered as any detriment to him that they were made by an executor de son tort." To the same effect, see 11 Am. & Eng. Enc. Law (2d Ed.) 1352.

Mr. Chief Justice Lord, in Rutherford v. Thompson, 14 Or. 236,

12 Pac. 382, in discussing the effect of our statute amending the common-law rule, and of the right of an executor de son tort to be credited with payments which he may have made that are tantamount to a due administration of a decedent's estate, says: "The person who intermeddles with the goods of the deceased is now only responsible to answer in an action to the rightful executor or administrator. And whether we consider the intermeddler as an executor de son tort or as a wrongdoer, the liability to respond to the rightful executor or administrator is the same, and unaffected, and the law unchanged. The fiction of office may be gone, but the unauthorized act of intermeddling remains, to be dealt with judicially, according to the principles of right and justice, as applied by the law in such cases. Now, from the fact that the intermeddler with the goods of a deceased is only liable to respond to the rightful executor or administrator for the value of the goods, etc., it by no means follows, if what he did was of benefit, and not injury, to the estate—as the payment of funeral expenses, or debts of the deceased, or charges such as the rightful representative might have been compelled to pay—he would not be allowed to show the same in mitigation of damages in an action of trover, instituted by such executor or administrator. In thus compelling him to account with only the rightful representative the statute does not purport or undertake to deprive him of any proper or legitimate defense. The title of executor de son tort may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate."

We think Slate had an adequate remedy, in the law action instituted by Henkle against him, to recoup against the claim for damages caused by his intermeddling all payments made by him that necessarily conduced to the benefit of his mother's estate. There are some items, however, in his claim, as disclosed by the cross-bill, that could never have been of any advantage thereto. Thus the sums paid to the surety company for responsibility assumed on Slate's undertaking, and also the appraisers' and justice's fees [for administering oaths to appraisers]. The sum paid on account of attorney's fees was no advantage, unless the service rendered was in preserving the property of the estate; certainly not in the ordinary settlement thereof, or in defending in the former suit. The sum of $100 claimed by Slate [for services performed in caring for the decedent's property from May 6, 1900, to March 3, 1902] should not be allowed, unless his service, like that of his attorneys, was performed in preserving or caring for the property, resulting in a benefit thereto. He is not entitled to any sum whatever as administrator's fees, and if the county court appointing him had allowed and he had secured the sum prescribed by law as compensation in such cases, as he was only a de facto representative of the decedent's estate the de jure administrator could have recovered such fees from him, for the rule is almost universal that

an officer de facto is liable to an officer de jure for emoluments of office after ouster. Throop, Pub. Officers, §§ 256, 523, 663. * * *

In the case at bar Slate was interested in the estate of his mother and therefore not a volunteer, and, as he could have interposed the defense indicated in the law action, an error was committed in overruling the demurrer.

The decree will therefore be reversed, the demurrer sustained, and the cross-bill dismissed.[26]

SECTION 6.—REFUNDING BY CREDITORS

WOLF v. BEAIRD et al.

(Supreme Court of Illinois, 1888. 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565.)

MAGRUDER, J. Edward J. French died testate on March 3, 1880. This will was admitted to probate in the county court of Richland county, and letters testamentary were issued to the appellant, John Wolf, as the executor thereof, on March 8, 1880. The county court allowed two claims against French's estate, one on May 18, 1880, and another on August 17, 1880, in favor of John B. Gharst. During the first year of the administration Wolf had money enough on hand to pay in full all the claims filed against the estate before the end of that year. He paid Gharst 30 per cent. of his two claims on August 17, 1880, and he paid him the balance of such two claims on October 15, 1880. On the latter date Gharst's total claim against the estate was paid in full. At the time Wolf paid Gharst's claim in full, he and Gharst both believed that French's estate was solvent, and would not only be able to pay all the debts, but would have a surplus for the heirs. Both parties acted in good faith, the executor in paying, and the creditor in receiving, the full amount of the claim.

If the claims hereafter mentioned, which were not known to exist at that time, had not been filed, the surplus would have amounted to $1,800. Two large claims were allowed against the estate, one on June 20, 1881, in favor of Robert Allyn, trustee, and another on June 21, 1881, in favor of Lucy French, which made the estate insolvent as to the payment of claims of the seventh class. By the allowance of these latter claims, the assets were so reduced that the estate was

[26] In Bradley v. Com., 31 Pa. 522 (1858), it was held that letters of administration issued on a bond executed by only one surety, when the law required two or more, were void, and that the woman acting under them "became administratrix of her own wrong." But see Steele v. Tutwiler, 68 Ala. 107 (1880).

only able to pay 61.72 per cent. of the claims of the seventh class, to which the Gharst claim and the Allyn and Lucy French claims all belonged. It thus turned out that Gharst had been overpaid by the amount of the difference between 100 per cent. and 61.72 per cent. Gharst died testate on September 4, 1881, and the appellees are the executors under his will.

Wolf, as executor of the estate of E. I. French, deceased, filed a claim against Gharst's estate, in the county court of Richland county, for the excess of the amount so paid to Gharst over the pro rata share to which he was properly entitled. On June 20, 1882, this claim of Wolf against Gharst's estate was allowed by the county court, and an appeal was taken to the circuit court, where the case was tried before the circuit judge, without a jury, by agreement. The circuit court ordered that the claim be allowed as a seventh class claim, to be paid in due course of administration, and directed that its order be certified down to the county court for payment. The case was then taken by writ of error to the Appellate Court, which, at its February term, 1886, reversed the judgment of the circuit court, and remanded the cause. A second trial was had before the circuit judge without a jury, at the November term, 1886, which resulted in a judgment in favor of appellant against appellees.

This judgment has been brought before the Appellate Court a second time, and has been again reversed. It now comes before us by appeal from the Appellate Court, and upon certificate that the case involves a question of law of such importance, on account of collateral interests, that it should be passed upon by the Supreme Court.

Both Wolf and Gharst knew, or were bound to know, that, under the law, Gharst could not lawfully receive his claim in full out of the assets of the French estate, unless those assets were sufficient to pay all claims of the same class with his own. There was a mutual mistake of facts in respect to which both parties were equally bound to inquire. They both believed that the assets were sufficient to pay the claims in full, and acted upon such relief; but both were mistaken in regard to the fact. "Money paid by one party to another, through a mutual mistake of facts, in respect to which both were equally bound to inquire, may be recovered back." Bank v. Bank, 1 Hill (N. Y.) 287; Wheadon v. Olds, 20 Wend. (N. Y.) 174. "The count, for money had and received, is also maintainable for the recovery of money paid under a mistake, on the part of the payer, of a material fact." 2 Chit. Cont. (11th Ed.) 928; 1 Chit. Pl. 355; Bank v. Mitchell, 88 Ill. 52; Stempel v. Thomas, 89 Ill. 147.

Wolf was mistaken in a material fact. If he had not been mistaken in the fact, which he supposed to exist, that the assets were sufficient to pay the claims in full; in other words, if the assets had been sufficient to pay the claims in full, he would have been liable to pay Gharst the 38.28 per cent. so paid to him by mistake. The filing of

the claim by Wolf against Gharst's estate was in the nature of an equitable action for money had and received, or money paid under a mistake of fact. If Wolf could have brought an action of assumpsit against Gharst in the latter's lifetime, for the excess of the payment over the proper pro rata share, then a claim for such excess was a proper claim to be filed against Gharst's estate, so far as the nature of the demand is concerned.

It was held in Rogers v. Weaver, 5 Ohio, 536, that an administrator, who, under the supposition that the estate was solvent, had paid a creditor beyond his distributive share, might, upon final settlement, recover back the difference in an action for money had and received. See, also, Walker v. Hill, 17 Mass. 380.

When this case was tried a second time before the circuit judge, at the November term, 1886, it was proven, that appellant had filed his final report, as executor, on July 15, 1886, and had been discharged by the county court. The order of the county court, entered at date, found that the assets were only adequate to pay 61.72 per cent. of the claims of the seventh class; that the estate was insolvent as to those claims; that Wolf had paid 61.72 per cent. upon all the claims of the seventh class; and the final report was by such order confirmed and the estate declared to be settled. Hence it appeared affirmatively that appellant had advanced out of his own pocket the 38.28 per cent. overpaid to Gharst. Otherwise he could not have settled all the seventh class claims at 61.72 per cent. of their amounts.

It is claimed that appellant could only sue in his individual capacity, and not as executor, for the overpayment to Gharst, and that he could not bring suit until he had advanced money enough out of his own means to make up to the French estate the amount of such overpayment, the amount which was paid to Gharst by mistake, having been the money of the estate and not his own money. Upon these grounds it is urged that when the claim was first filed in the county court, in 1882, the cause of action was not ripe for suit. When the claim was presented to the county court, in June, 1882, Gharst's estate owed the amount which had been overpaid to him in his lifetime.

Whether Gharst's estate then owed that amount to appellant, as executor, or to appellant, as an individual, or to the other creditors of the French estate, matters not, so far as the existence of the indebtedness was concerned. The debt existed to somebody, and the same debt existed all the way through up to the last trial in November, 1886. It could make no practical difference to the Gharst estate who owned the claim against it. As Gharst had received more money than he ought to have had, his estate was liable to refund the amount. This liability remained the same from the beginning to the end, whatever variations there may have been in the ownership of the claim, or in the form of the evidence, by which it could be substantiated. In adjudicating upon the claim, the county court was possessed of an equi-

table jurisdiction. Dixon v. Buell, 21 Ill. 203; Hurd v. Slaten, 43 Ill. 348. Equity disregards mere matters of form, and looks at the substance.

It is said that when the claim was filed against Gharst's estate, the county court had not declared the French estate insolvent, and had not, by an order fixed the amount of the dividend or pro rata percentage belonging to the creditors. Nevertheless the amount of such percentage was capable of ascertainment, in June, 1882. The proof showed at that time the assets of the French estate, the amount of Gharst's claim, and the amounts of all the other claims, including those filed in June, 1881. From these data it was easy to figure the amount of the percentage the creditors were entitled to and the amount of the overpayment to Gharst. The subsequent order made on July 15, 1886, was more certain and definite evidence, but after all it was only evidence of what already existed. When the appeal was taken to the circuit court, the trial in the latter court, in November, 1886, was de novo, and it was proper to introduce then as evidence the order of July 15, 1886, though the same evidence had not yet come into existence in 1882. Thorp v. Goewey, 85 Ill. 611.

It is said that this claim was improperly filed by Wolf, as executor of the estate of E. J. French, deceased. The money was paid to Gharst after the death of French. The law created an implied contract on the part of Gharst with Wolf to pay back the excess. An executor or administrator may sue, either in his representative or in his personal character, on contracts made with him after the death of the deceased. Dicey, Parties, 233. Where the indebtedness thus grows out of a contract with the executor, he may sue in his own name; or if the word "executor" or "administrator" is used after his name, it will be regarded as merely descriptive of the person, and as being immaterial. Laycock v. Oleson, 60 Ill. 30. The legal title to the money paid to Gharst was in Wolf. Neubrecht v. Santmeyer, 50 Ill. 74; Walker v. Craig, 18 Ill. 116; Makepeace v. Moore, 5 Gilman, 474.

The right of action was in Wolf. The statute does not require any written pleadings in the case if a claim be presented to the county court. Thorp v. Goewey, supra. If the right of action was in Wolf, as trustee for the French estate, upon the trial, in 1882, but was in Wolf, as an individual, in 1886, by reason of his advance to the French estate of the money overpaid to Gharst, this change could make no difference to the Gharst estate. Wolf was still the legal claimant, whether claiming for himself or in trust for another. He could not charge the French estate with any of the costs or expenses of prosecuting the claim against the Gharst estate, even though he sued as executor, because he was suing to recover back money improperly paid out by himself.

Although the judgment entered by the court in November, 1886, was in favor of Wolf, as executor, he was entitled to the money in his

individual capacity. The mere addition of the word "executor" to his name would make no difference; nor could the amount of the judgment be recovered from him by the French estate, as assets of that estate, because he could plead as an off-set the amount advanced by him to the French estate to make up the overpayment to Gharst.

We think the judgment rendered by the circuit court was right. The judgment of the Appellate Court is therefore reversed.[27]

[27] See Morris v. Porter, 87 Me. 510, 33 Atl. 15 (1895); Tarplee v. Capp, 25 Ind. App. 56, 56 N. E. 270 (1900). See, also, Woodruff v. H. B. Claflin Co., 133 App. Div. 874, 118 N. Y. Supp. 48 (1909), where the payment was the result of a compromise by the administratrix with the creditor, and the court said: "Whatever mistake or negligence in the transaction may be imputed to the administratrix, the estate ought not to suffer. The transaction concerned, not these two alone, but all other persons interested in the estate beneficially, and the surety also. A private compact between the two could not legally affect the rest when made to their detriment. This overpaid creditor had no equitable right to retain the excess received above its pro rata share of assets." Compare Golding v. McCall, 5 Ga. App. 545, 63 S. E. 706 (1909). But see Carson v. McFarland, 2 Rawle (Pa.) 118, 19 Am. Dec. 627 (1828); Findlay v. Trigg's Adm'r, 83 Va. 539, 3 S. E. 142 (1887); Staples' Ex'r v. Staples, 85 Va. 76, 7 S. E. 199 (1888), where the right of the administrator to compel the creditors to refund is denied.

In Flint v. Valpey, 130 Mass. 385 (1881), the right to recover from the creditor was held not to accrue until the decree of distribution was made, because until such decree it is not proven that the estate is insolvent, nor, if it is insolvent, how much the personal representative should recover.

CHAPTER IV

THE PAYMENT OF LEGACIES AND DISTRIBUTIVE SHARES

SECTION 1.—THE TIME OF PAYMENT OF LEGACIES AND INTEREST, DIVIDENDS, AND UPKEEP CHARGES ON LEGACIES

PEARSON v. PEARSON.

(High Court of Chancery in Ireland, 1802. 1 Sch. & L. 10.)

The bill was filed by the executor of Matthew Pearson, to have the trusts of his will carried into execution under the direction of the court.

By this will several pecuniary legacies were bequeathed with directions that they should be paid within a week after the death of the testator, or in failure thereof that they should bear interest from that time. There followed other legacies to Mrs. Vickers, and to ——— Vickers her son, which were given generally without assigning any time for payment, and the residuum was bequeathed, one-half to be divided by the executor between the sons and daughters, grandsons and granddaughters of testator's cousins Roger and Henry Pearson, share and share alike, and the other moiety to his said executor for his own use, subject to make good the other demands created by the will.

The testator died possessed of a considerable personal estate, consisting chiefly of bank stock and government debentures. One question which arose upon the will was, whether the legacies to Mrs. Vickers and her son bore interest, the personal estate being a productive fund.

Mr. Burne and Mr. F. W. Greene, for these legatees, cited Maxwell v. Wettenhall, 2 P. Wms. 27 (4th point): "If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half yearly, it seems in this case the legacy shall carry interest from the death of the testator."

Lord Chancellor [Redesdale].[1] As to the reason given for the rule mentioned in Maxwell v. Wettenhall, that the legacy is payable out of a fund which is yielding profits, I take it that makes no difference.

[1] Part of the case relating to costs is omitted.

In case of a legacy charged upon lands, the land yields profit: but that is not the reason that in such case the legacy bears interest immediately. The rule with respect to legacies out of personal estate is taken from the practice in the ecclesiastical courts where a year is given to the executor to collect the effects, and he cannot be called upon to pay before that time, because he cannot know until then what fund there is to pay; in conformity to this, courts of equity have proceeded, in the case of legacies out of personal estates. But in the case of legacies charged upon lands only, where no day of payment is fixed, interest must be chargeable from the death of the testator or not at all.

Nothing can be more settled than that a man's saying, "I direct all my stock to be applied to the payment of legacies," will not make those legacies bear interest one moment sooner than they otherwise would. Whether the fund bears interest or not is totally immaterial in the case of pecuniary legacies. I remember a case of Greening v. Barker, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after testator's death, and the court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months all the intermediate profits belonged to the residuary legatee. The executor may pay the legacy within the twelve months, but is not compelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets he is to pay interest from the end of the twelve months, whether the assets have been productive or not.[2]

WELCH et al. v. ADAMS et al.

(Supreme Judicial Court of Massachusetts, Suffolk, 1890. 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244.)

DEVENS, J.† * * * The first question presented by the executors, according to the report, is whether the legacy by Mr. Isaac Adams to his wife carries interest from the date of the testator's death, or from the end of one year thereafter. This bequest was of "the sum of sixty-four thousand dollars in money, to be paid her as soon as convenient after my decease," and was acccompanied by a devise to her of five pieces of productive real estate in Massachusetts, of which she was

[2] On a legatee as a creditor entitled to interest, see In re Rutherford, 196 N. Y. 311, 89 N. E. 820 (1909).

As to interest on legacies, see, also, 3 Prob. Rep. Ann. 563, note; 9 L. R. A. 248-250, note; 6 Am. & Eng. Ann. Cas. 525, note. In Harrison v. Watkins, 127 Ga. 314, 56 S. E. 437 (1907), interest did not begin to run for 17 years.

† Part only of the opinion is given.

dowable. These provisions by the devise and bequest in behalf of his wife are declared to be in full satisfaction "of her dower and homestead rights in my estate, and of all distributive share or rights whatsoever therein." In Pollard v. Pollard, 1 Allen, 490, it was held that a widow to whom a legacy was given in lieu of dower was entitled to be paid in full, in case of a deficiency of assets, in preference to legatees who were mere volunteers, and also to receive interest thereon from the death of the testator, if he had provided no other means for her support during the first year after his death; and this upon the ground that she is to be regarded as a purchaser for value, by reason of her relinquishment of her important rights in her husband's estate.

The question here presented is, however, to be decided according to the law of New Hampshire. It is not merely a question of how property shall be here administered, but what is the construction and effect of the will, and what was the intent of the testator by its provisions. The construction of the will, and the distribution thereby made of the testator's personal estate, are to be governed by the law of his domicile. Sewall v. Wilmer, 132 Mass. 136; Pub. St. c. 138, § 1. By the law of New Hampshire, as of Massachusetts, the wife is treated, in accepting a provision by will, as a purchaser for value, and the general rule which applies in the case of creditors who receive a legacy in satisfaction of a debt, and who are held entitled to interest from the death of the testator, would apply where no different intent is shown. Towle v. Swasey, 106 Mass. 100; Williamson v. Williamson, 6 Paige, 298. But by the law of New Hampshire, as of Massachusetts, while the widow is a purchaser for value she also has a right to determine whether she will accept the provision made, and to accept or reject it as she may choose. Gen. Laws N. H. c. 202, §§ 9, 18; c. 193, § 13. If she accepts it, she must accept upon the terms and conditions on which it is made. She can have only what the will gives her, and in the mode in which it gives the property bequeathed to her.

The precise point decided in Pollard v. Pollard, ubi supra, does not appear to have been decided in New Hampshire. In Loring v. Woodward, 41 N. H. 391, it is said that to the general rule there laid down, that a pecuniary legacy, payable generally, without designation of any time of payment, is payable at the end of a year from the death of the testator, without interest, and, if not then paid, with interest after the end of the year, there is one exception, which is in favor of minor children of the testator, who are entitled, unless other provision is made for their support, to interest upon their legacies from the date of the testator's decease. It is argued, therefore, by the residuary legatees, that in New Hampshire no such exception exists in favor of the testator's widow as has been held to exist in Massachusetts, as otherwise the learned chief justice of New Hampshire who delivered the opinion would not have failed to state it. We shall not have occasion to consider this contention, or whether the language used is fairly to

be construed as holding that no other exception to the general rule than that specified actually exists in New Hampshire.

We are of opinion that upon other grounds the position taken by the residuary legatees is correct. In Pollard v. Pollard, ubi supra, it is clearly implied that if other provision is made by the testator for the support of the wife, which will avail her during the year following her husband's decease, she would not be entitled to interest from that time. The legacy to Mrs. Adams was accompanied by a devise to her of five pieces of productive real estate, to the considerable income of which she became at once entitled, and the case is not presented of a widow left without other means of support than her legacy. In Loring v. Woodward it is said that minors are entitled to interest upon their legacies from the decease of the testator only in those cases where no other provision was made. If, therefore, it can be held that in New Hampshire the same exception exists in favor of the widow as to the allowance of interest that exists in this commonwealth, it cannot be reasonably doubted that it applies only in those cases where other provision is not made for her support. Again, it is said in Loring v. Woodward, ubi supra, that the general rules there laid down on the subject of interest and income do not apply where specific directions are given by the will, or where a different intention is to be inferred from its provisions.

The inference is fairly to be drawn from the provisions of Mr. Adams' will that he did not intend that the payment of the legacy should be immediate. If a will is silent as to the time when a legacy is to be paid, one to whom such a legacy is bequeathed, and who stands in the position of a purchaser for value, is entitled to have the time of payment determined by the legal presumption of the intent of the testator. If a time were specified for its payment, he could make no claim for any delay in its payment except after the expiration of the time specified. By the terms in which the legacy to Mrs. Adams was given, no time for its payment was specifically stated; but the provision that "it shall be paid as soon as convenient after my decease" distinctly shows that the legacy would not be paid at once, but that its payment would be governed by the convenience of the estate. The rule that legacies draw interest only after the expiration of a year contemplates that such a time is a reasonable one for the collection of assets and reducing them to money. By accepting her legacy to be paid at the convenience of the estate, for that is its fair interpretation, the widow consented to wait for the expiration of the usual time for its payment. It follows that she would not be entitled to interest until the end of a year, and such instruction is given accordingly.[8]

The next question reserved for our consideration by the report, and

[8] In Good Samaritan Hospital v. Mississippi Valley Trust Co., 137 Mo. App. 179, 117 S. W. 637 (1909), it was held that where the probate of a will is contested, and legacies therefore cannot be paid until the establishment of the will, general legacies do not bear interest pending the contest, since interest

on which the bill requests instructions, is whether the interest upon both the legacies of $64,000 to the widow and $5,000 to Julius Adams, is affected by a deposit made on August 8, 1887, with the New England Trust Company, to the credit of Julius Adams, of an amount equal to these sums; and also in what manner, and at what rate, interest on these sums shall be computed. * * *

On August 8, 1887, the plaintiffs, after some correspondence with Julius Adams, who had become the administrator with the will annexed of the estate of his mother, who had then deceased, deposited with the New England Trust Company the amount of the two legacies of $64,000 and $5,000 (together with another sum for rents collected, not necessary to be here considered) to the credit of Julius Adams. These sums were deposited without any interest being included, the matter of interest having been the matter in dispute between Adams and the executors. Adams never authorized or ratified this deposit with the trust company, refused to receive the deposit book, and has in no way recognized the deposit, which bore interest at the rate of 2½ per cent. He had been informed before the deposit was made, he having declined to receive these sums without interest, that they would be thus deposited unless he should receive them, or designate some other place for their deposit.

On behalf of the residuary legatees it is contended that the executors had a right to require Julius Adams to receive, on account of the legacies, the principal of the amounts due; that he was not at liberty to refuse to receive any portion unless the whole sum due was paid; and that the deposit of these sums with the trust company was a valid appropriation in part satisfaction of the legacies. It is conceded by them that the legacies carried interest from the end of a year after the testator's death, and therefore that the sums deposited on account of the legacies were less than the amounts due at that time.

cannot begin until the legacies are payable. Compare In re Gans' Will, 130 App. Div. 454, 114 N. Y. Supp. 975 (1909). But see In re Woodward's Estate, 78 Vt. 254, 62 Atl. 718 (1903), where the court says (78 Vt., at page 258, 62 Atl., at page 719): "But, if the probating of the will or the granting of letters is made the controlling factor, the value of a bequest may be lessened by a postponement of payment without interest, on the happening of a great variety of contingencies which the testator cannot be supposed to have had in contemplation. When this takes place, the scheme of the ordinary will is reversed, and the more favored bequests are lessened in value to increase the residuum." And see In re Rutherford, 196 N. Y. 311, 315, 89 N. E. 820, 821 (1909), where the court said: "Whether the assets of the estate have been fruitful or unproductive does not affect the right of the legatee. He is in the same position as a creditor, and entitled to be awarded interest at the legal rate for such time as he is kept out of his demand." Compare the question of when the liability of a devisee for interest on a legacy charged upon the land or upon him personally begins. 12 Prob. Rep. Ann. 309, note. As to the devisee's personal liability, see 129 Am. St. Rep. 1056, note. On the devisee's defense of the statute of limitations to the debts so charged, see 8 L. R. A. (N. S.) 393, note.

The first inquiry which we consider in this transaction is whether the plaintiffs, as executors, were then in a position rightfully to make appropriations for the payment of legacies. If they were not, Adams could not be called upon to deal with them, nor be bound to assent to their acts. * * * On the 8th of August, 1887, the plaintiffs were not executors in this commonwealth. As executors of a foreign will, they had no right to act here, and to dispose of the estate here. In order that they should have this authority, it was necessary that the will should have been here admitted to probate, and letters testamentary issued to them. Campbell v. Sheldon, 13 Pick. 8; Pub. St. c. 127, § 7. * * *

Adams was not called upon to deal with the plaintiffs while occupying so ambiguous a position, or to recognize them as having authority as executors under the laws of New Hampshire to deal with property here without having been authorized to do so by this commonwealth. Until, in its discretion, the probate court directed the personal estate here found to be transferred to the foreign jurisdiction, executors there could not rightfully deal with it. Many acts may without doubt be done by one as executor previous to his appointment, as such, which, if in themselves not illegal, and such as an executor may properly do, might be validated by his subsequent appointment relating back to the time of doing the acts. No person, however, is required to deal with one who may thereafter be appointed as executor, trusting to the chance that he will be appointed, or to consent to appropriations made by him in the anticipation that they may thereafter be lawfully made. * * * At the time when the plaintiffs undertook to offer payment of the legacies, to appropriate a sum therefor, and to make a deposit thereof, they had no authority to do so in such manner that the rights of the legatees would be affected.

Nor, irrespective of this matter of the plaintiffs' authority, are we of opinion that legatees are bound to accept a payment by installments which should operate pro tanto to diminish their claims. * * * In this commonwealth, * * * the probate courts are authorized to order partial distribution of the funds of estates in the course of administration. Pub. St. c. 136, § 21. * * * The existence of the power in the court to order partial payments, and its frequent exercise, do not indicate that the executors have any such power, but rather otherwise. If the legatee or creditor should consent to receive partial payments, which no doubt are often made without any order of court, it certainly would be right that interest on his claim should be diminished. In the case we are considering the two sums offered to Adams, and deposited to his credit, were refused by him, and it is conceded that they did not equal, interest included, the amount of the legacies to which, in his own right and that of his mother, he was entitled. Even if the offer was made that Adams should receive these sums for the legacies, leaving the question of in-

terest upon them open for further consideration or litigation, he was under no obligation thus to accept them. * * *

The question remains to be determined at what rate interest shall be computed. It is urged on behalf of the residuary legatees that it should be something less than the legal rate, and that certainly this should be so after the deposit made by the plaintiffs, upon which only 2½ per cent. was to be allowed. In the view we have taken, the matter of interest is not affected by the deposit. That interest at the legal rate is payable after one year from the testator's death, is well established as a general rule in Massachusetts and New Hampshire. Loring v. Woodward; Kent v. Dunham, ubi supra [106 Mass. 586]; Ogden v. Pattee, 149 Mass. 82, 21 N. E. 227, 14 Am. St. Rep. 401. Even where the estate could not have been reduced to money within that time, or where the administration had not been taken for a considerable time after the death of the testator, it would still be allowed to the legatee as an incident and accretion to the legacy. Ogden v. Pattee, ubi supra; Lamb v. Lamb, 11 Pick. 371; Martin v. Martin, 6 Watts (Pa.) 67. This allowance is made, not merely because it will be presumed that the estate will, after the year has expired, have actually made this sum, but also because, as it would be difficult, if not impossible, to investigate how much interest had been made in such cases, it is a reasonable rule to adopt that rate of interest which the law has fixed where none other is stipulated for.

It is urged that it is a matter of public knowledge that no interest can now be obtained as high as 6 per cent. on any safe investment; that such an allowance should no longer prevail; that the court should determine, either directly or with the aid of a master, what could reasonably have been obtained, and that this only should now be allowed. It is probable that the rate of interest does not so nearly represent now what can be earned by a safely invested fund as it did when it was originally established by statute as the legal rate, and that it would be difficult now to obtain it. But, as it is inferred that where no time is specified for the payment of a legacy it is not to be paid until the end of a year from the death of a testator, so it is a reasonable inference that the testator intended, if the legatee did not receive it until some time after that period, that he should then receive it with the interest allowed by law. His gift fairly imports this, because that is the rate where a debt or payment which is due in præsenti is deferred. This view is not in conflict with Williamson v. Williamson, 6 Paige (N. Y.) 298, and Healey v. Toppan, 45 N. H. 243, 86 Am. Dec. 159.

The question in these cases was not between legatees of specified sums and the estate, but between those who were the legatees, one class of whom were entitled to an estate for life in the legacy, and the other to the remainder. As between them, there was no doubt that the tenant for life, after the fund was actually formed, was entitled only to the interest or income which it produced. In determining what should be

the basis of apportionment between them before the settlement of the estate and before it was actually formed and productive, it was determined that 5 per cent. upon it as ultimately ascertained would be right, as it represented the income which might have been obtained. It by no means follows that what is right as between legatees interested in different proportions in the same fund is a proper rule between a legatee of a definite sum and the estate of the testator.

It is urged that by the English rule less than the usual or legal rate of interest is often allowed, and that the amount of interest which legatees are entitled to recover is regulated by the court of chancery with reference to the amount which executors could have made, and that this rate has been diminished from time to time by reason of the change in the value of the interest upon money. Beckford v. Tobin, 1 Ves. Sr. 308, 311; Guillam v. Holland, 2 Atk. 343; Wood v. Briant, Id. 523; Sitwell v. Bernard, 6 Ves. 520. The rule of the court of chancery appears from these cases to have been that it could determine, at its own discretion, how much interest should be allowed, and even without inquiry into the circumstances of any particular case. Sitwell v. Bernard, ubi supra. No action could have been brought at common law to recover the amount of a legacy which was treated only as a direction to the executor. The remedy of the legatee was only in the ecclesiastical courts or the court of chancery. These courts have always assumed the right to determine the terms on which the beneficiary should receive it. This is given as one of the reasons why an action at law should not be maintained for it. Deeks v. Strutt, 5 Term R. 690; Allen v. Edwards, 136 Mass. 138.

In this commonwealth an action at law has long been the remedy to recover the amount of such a legacy. Allen v. Edwards, 136 Mass. 138, and authorities cited. Such is the rule, we believe, in most, if not all, of the states of the Union. While in many cases interest has been recovered, none has been cited or is known to us where it has been at less than the legal rate. It has been recovered upon the same principle that it is awarded in any case where the payment of a debt due has been deferred. We have no reason to believe that the law of New Hampshire in this respect differs from that which prevails in this commonwealth, and we do not feel authorized to change the rule so long as the statute remains unchanged which fixes a rate of interest. Kent v. Dunham, ubi supra; Ogden v. Pattee, ubi supra; Pub. St. c. 77, § 3; Wood v. Corl, 4 Metc. 203; Loring v. Woodward, ubi supra; Gen. Laws N. H. c. 232, § 2.

The executors are therefore instructed that the legacies of $5,000 and $64,000 are payable, with legal interest, in a year from the death of the testator. Instructions accordingly.[4]

[4] On the rate of interest, see Loring v. Thompson, 184 Mass. 103, 68 N. E. 45 (1903).

WELSH v. BROWN.

(Supreme Court of New Jersey, 1881. 43 N. J. Law, 37.)

On writ of error to Morris circuit.

Catherine Welsh died on the 22d of April, 1874. By her will, dated April 20th, in the same year, she made to the plaintiff the following bequest:

"I do give and bequeath to my niece, Aletta Brown, my gold watch, my melodeon, my black earrings, my black furs, one set silver teaspoons (second choice), my cashmere shawl, my brown silk dress, and the interest of twenty-five hundred dollars, to be paid to her annually by my executor; and at her death the said sum of twenty-five hundred dollars shall be paid to or divided equally among any child or children of hers that may then be living, or their heirs; but if the said Aletta Brown shall die leaving no children or grandchildren living, then I do order the said sum of twenty-five hundred dollars divided equally among my heirs. I also give her all my mourning clothing."

She also gave sundry pecuniary legacies and specific legacies of personal property to different legatees, after which the will contained the following provisions:

"I do order that none of the legacies or interest herein given or bequeathed shall be due or payable during the lifetime of my mother, but that all interest that may accrue or become due on any obligations belonging to my estate shall be used for the comfort and support of my mother; and if said interest is not sufficient, then I do order my executor to pay out of my estate such sum as may become necessary for the support of my said mother and for her burial."

She further orders and directs as follows: "I do order and direct that all taxes that may be levied or assessed on any money or interest herein bequeathed or given away shall first be deducted from the said money, and the balance paid, and said money or interest shall be subject to the taxes as long as it remains in the hands or control of my executor. * * * I do order and direct that, after putting at interest a sum sufficient to pay the interest, and paying the legacies herein bequeathed, and after settling my estate, if any balance shall be found due my estate or in the hands of my executor, he shall then divide such sum, share and share alike, among my heirs."

This action was brought by Miss Brown, the legatee, against the executor of the deceased, to recover $175, one year's interest on the said sum of $2,500, accruing between the 22d of April, 1874, and the 22d of April, 1875. The defendant demurred to the declaration, and the question designed to be raised by the demurrer was, whether, under the bequest to the plaintiff, she was entitled to interest on the said sum of $2,500 from the death of the testatrix, or from the expiration of one year from that event.

This question the court below decided in favor of the plaintiff below. Hence this writ of error.

DEPUE, J. In determining as of what time legacies shall take effect and be payable, certain general rules have been adopted; and testators, in making their wills, are considered as framing their testamentary dispositions in view of those general rules.

Specific legacies are treated as severed from the bulk of the testator's property by the operation of the will, and their increase and emolument are regarded as specifically appropriated for the benefit of the legatee from that period; though the time for the enjoyment of the principal may be postponed to a future period. With respect to general legacies, the law, for convenience, has prescribed, as a general rule, that where no time is named by the testator, and in the absence of any intention derived from the will itself, such general legacies shall be raised and satisfied out of the testator's estate at the expiration of one year next after his death. 2 Roper on Leg. 1245; 2 Lead. Cas. in Eq. 639, notes to Ashburner v. MacGuire.

On a legacy coming within the class of general legacies, if the legacy be not paid at the expiration of the year, interest from that time will be allowed as damages; and interest on a legacy will not be computed from a period prior to that time, unless there be a clear expression of intention that interest shall be reckoned from an antecedent time or event. In that case the interest is regarded as of the substance of the gift, and is not recoverable, as such, unless there be a clear intention apparent on the face of the will that interest shall be payable from a period prior to the expiration of the year.

To this general rule there are a few well-established exceptions. A legacy given in satisfaction of a debt will carry interest from the testator's death. Clark v. Sewell, 3 Atk. 99. Interest on a legacy to a minor child of the testator, or to one to whom the testator is in loco parentis, will be allowed from the testator's death as a provision for maintenance, where no provision is made by will or otherwise for the support of such legatee. Brinkerhoff v. Merselis, 24 N. J. Law, 680; Cox v. Corkendall, 13 N. J. Eq. 138; Hennion's Ex'rs v. Jacobus, 27 N. J. Eq. 28; Ex'r of Kearney v. Kearney, 17 N. J. Eq. 59, 63, 504.

Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event. In this respect an annuity differs from a general legacy; for a general legacy, not being payable out of the testator's assets before the end of the year from the testator's death, no interest will be due thereon until the expiration of the second year. 2 Rop. on Leg. 1245.[5]

[5] Interest was allowed on the unpaid annual payments of an annuity in Willcox v. Willcox, 106 Va. 626, 56 S. E. 588 (1907).

There is another class of cases which are apparently exceptions to this general rule; but those cases stand upon peculiar and special grounds, and are regarded as a class by themselves. On a bequest of the residue of the testator's estate, or of some aliquot part or proportion thereof, in trust to pay the interest or income to a legatee for life, with a gift of the principal over at his death, the interest or income payable to the life tenant will be computed from the testator's death. Green v. Green, 30 N. J. Eq. 451; Green v. Blackwell, 32 N. J. Eq. 768; Van Blarcom v. Dager, 31 N. J. Eq. 783; 2 Spence's Eq. Jur. 552–569; Howe v. Earl of Dartmouth, 7 Ves. 137, and the notes to that case in 2 Lead. Cas. in Eq. 686 et seq.

Cases of this class are distinguished from legacies of a definite sum with remainder over, with respect to the computation of interest to the life tenant. 2 Wms. on Ex'rs, 1391; Fearns v. Young, 9 Ves. 549, per Lord Eldon; Baker v. Baker, 6 H. of L. Cas. 623, per Lord Chelmsford; Van Blarcom v. Dager, 31 N. J. Eq. 783, per Dodd, J. In the case last cited, the computation from the testator's death of interest or income to the life tenant, where the gift is of the residue, is placed on a special equity as between the parties who are to participate in the gift, arising from the injustice that would be done to the life tenant by the addition of the entire interest to the capital. 2 Rop. on Leg. 1320.

That the computation of interest as between the life tenant and remainderman, where the corpus of the gift is the residue of the testator's estate, is founded exclusively on the special equity between the parties among whom the gift is to be apportioned, is apparent from an examination of the cases. For the first year, sometimes, the interest on the whole income is allowed the life tenant; sometimes only a portion of the income for the first year is allotted to the life tenant, and the balance is added to increase the capital, for the reason that, in such cases, the circumstances are such that it would be inequitable to the remainderman to give the whole produce of the first year to the life tenant; and sometimes the allowance to the life tenant for the first year is upon a percentage determined by the court, on a consideration of what would be just and equitable as between the parties, under the circumstances of the particular case. Hewitt v. Morris, 1 Turn. & Russ. 241; Fearns v. Young, 9 Ves. 552; Brown v. Gellatly, L. R. 2 Ch. App. 751; 2 Spence's Eq. Jur. 558 et seq.

The apparent conflict in the decisions on this subject is in a large measure due to the failure to observe the special grounds on which the computation of interest is made as between the life tenant and remainderman, where the corpus of the gift is the residue of the testator's estate. Some of it is also attributable to expressions used in that class of cases where interest is allowed by way of maintenance for minor children, or those to whom the testator is in loco parentis. If those cases which are universally considered as exceptional, and

as resting on special and peculiar grounds, are put aside, the decisions on the subject of interest on legacies are quite consistent and harmonious.

The contention upon which the judgment below is sought to be sustained is, that the gift to Miss Brown is of an annuity, and that the intention of the testatrix to pay her interest from her death is to be deduced from the language of the bequest.

An annuity is defined to be a yearly payment of a certain sum of money. 2 Wms. on Ex'rs, 809; Booth v. Ammerman, 4 Bradf. Sur. (N. Y.) 129. The first payment of an annuity given by will is due at the end of one year from the testator's death. This is one of the exceptions to the general rule with respect to the enjoyment by a life tenant of the benefits given by will. Where a general legacy is given to one for life, with remainder over to another, no interest will be due until the expiration of the second year. 2 Rop. on Leg. 1253.

This distinction between an annuity and a legacy for life with remainder over, was taken by Lord Eldon in Gibson v. Bott, 7 Ves. 89, 96. His language is: "If an annuity is given, the first payment is paid at the end of one year from the death; but if the legacy is given for life, with remainder over, no interest is due till the end of two years; it is only interest on the legacy, and until the legacy is payable there is no fund to produce interest." Mr. Roper approves of this distinction as founded on principle, and, speaking of the disposition of a sum of money and the interest of it given as an annuity to one for life, says that the annuity, being given in the form of interest upon a gross sum of money to be taken out of the assets as any other legacy, cannot be payable sooner than the fund produces the means for that purpose. 2 Rop. on Leg. 877.

In the present case the gift to the plaintiff is of the interest on a gross sum—$2,500—to be paid to her annually by the executor; and after the plaintiff's death the principal sum is payable to other parties. The will provides that the executor, after putting out at interest a sum sufficient to pay the interest and legacies bequeathed, shall divide the residue among the heirs of the testatrix. It further directs that all taxes on the money or interest bequeathed should first be deducted, and the balance only paid, and that the said money or interest should be subject to the taxes as long as it remained in the hands or under the control of the executor.

In substance the bequest is to the executor to invest and pay over the net income or interest, after deducting taxes, to the life tenant during her life, and after her death, to pay the entire principal to the legatees in remainder. The executor, in the administration of the estate as executor, was under no obligation to set apart the principal sum on which interest was allowed until the end of the first year; and until that separation was made, there was no fund to produce interest for the life tenant. In legal effect the bequest is analogous to those in Lowndes v. Lowndes, 15 Ves. 301, and Raven v. Waite, 1 Swanst.

553, upon which interest was allowed only from the expiration of the year.

In my examination of the English cases, I have not found a single decision in which a bequest similar to that under consideration, has been considered as excluded from the general rule that the legacy shall, for such purposes, take effect after the lapse of the year. The distinction between an annuity pure and simple, which is to be paid at all events out of the testator's estate at the expense of the residuary legatee, and the interest or income for life, of a certain sum set apart by the testator for that purpose, and given over in gross to another after the death of the life tenant, has been quite uniformly adhered to. Baker v. Baker, supra, was decided upon that distinction. Lord Cranworth, in delivering his opinion, said: "In all these cases arising upon the construction of wills, the real question is, whether that which is given is given as an annuity, or is given as the interest of a fund; and where that question is to be considered, what you must look to is this: whether the language of the testator imports that a sum, at all events, is annually to be paid out of his general estate, or only the interest, or a portion of the interest, of a capital sum which is to be set apart."

This distinction is recognized by Lord Justice Rolt in Birch v. Shewall, L. R. 2 Ch. App. 649. The principle on which it rests is that a bequest of a specific sum of money is one gift, one legacy, the benefit of which the testator has apportioned between the donee for life and the remainderman. To the life tenant he has given the interest or produce of the fund during life, and the capital sum to the remainderman after the death of the former. Such a legacy is, therefore, subject to the rule that general legacies are to take effect and be payable at the expiration of a year from the testator's death. The executor is not bound to set apart the legacy for investment before the end of the year; and until that be done there is no fund to produce the interest that is payable to the life tenant.

In Knight v. Knight, 2 Sim. & Stu. 490, the bequest was to each of the children of T. W., "as soon as they attain the age of twenty-one years, the sum of £2,000, with interest at the rate of five per cent. per annum;" and interest was held to be computable only from the end of the year, for the reason that the executors would not be bound to make an investment for the security of the legatees until the end of the year.

In the courts of this country the weight of authority is in the same direction.[6] * * *

I think that for the reason already given, the judgment should be reversed.

It may be remarked that, on a ground that may be technical, and was not taken on the argument, the same result would be reached. The testatrix directs that none of the legacies or interest given or

[6] The discussion of the American cases is omitted.

bequeathed, shall be due or payable during the lifetime of her mother. A copy of the will is annexed to the declaration, and by averment, made part of it; and the death of the mother of the testatrix is nowhere averred in the pleading.

Judgment reversed.

In re FLICKWIR'S ESTATE.

Appeal of JORDAN.

(Supreme Court of Pennsylvania, 1890. 136 Pa. 374, 20 Atl. 518.)

Under the will of the testatrix various legacies were given to the executors in trust. The legacies in trust were all substantially in the following form: "I give and bequeath to my executors, hereinafter named, the sum of $———, in trust, nevertheless, to pay the interest and income thereof to A. B. for life, and at her decease to pay and distribute the principal to C. D." etc. The estate being large enough to pay all the particular legacies and leave a residuary estate of about $77,000, the beneficiaries for life under the bequests to the executors asked the court to award them interest from the death of the testatrix upon the respective sums so bequeathed. This the court did, and three of the residuary legatees appealed.

MITCHELL, J.[7] Act Feb. 24, 1834, § 51 (P. L. 83), provides that "legacies, if no time be limited for the payment thereof, shall in all cases be deemed to be due and payable at the expiration of one year from the death of the testator." As interest only accrues by contract, or as damages for default of payment of money which is due, it followed that the deferring of the period of payment also postponed the accrual of interest until a year from testator's death. This is, therefore, the general rule, and it was the well-settled rule of the common law long prior to the date of the statute. It is, however, purely a rule of administrative convenience. It has no other merit.

Certainly, to take an example from the case in hand, there is no inherent equity in mulcting the primary legatees of a solvent estate, in a year's income, for the benefit of the residuaries, presumably the lowest in the scale of the testator's intended bounty. Being a rule of convenience only, it gives way at all times to the intent of the testator, whether express, as provided for in the statute itself, or implied from the general scheme of the will, or from particular expressions, or from the situation of the legatee, especially with reference to the testator. Certain exceptions, therefore, arising primarily from the testator's intent, have become as firmly established as the rule itself. The one with which we are specially concerned is the case of

[7] The statement of facts is rewritten and abbreviated. The opinion in the court below is omitted.

an annuity, or its practical equivalent—the interest of a sum of money.

It is settled that an annuity given as such commences from the testator's death. Rop. Leg. 877. In Gibson v. Bott, 7 Ves. 96, Lord Eldon said that that was certainly the rule, but he remembered when it was not clear. In the same case he states that if a legacy is given for life, with remainder over, no interest is payable until the second year, and intimates that that is also the rule where a sum is given to be placed out to produce an annuity. On this authority, Roper lays down the rule that interest on a gross sum given as an annuity does not commence till a year after death. Roper, however, says there is no express decision to this effect, and Toller says the point is doubtful. Toller, Ex'rs, 324. This was the state of the authorities when the point came before this court, and the distinction intimated by Lord Eldon was repudiated.

In Eyre v. Golding, 5 Bin. 472, the gift was to R., of "the interest of £400, to be paid her annually during her natural life." Chief Justice Tilghman held that interest was payable from the date of testator's death, saying: "The devise is not of a gross sum, but in the nature of an annuity. * * * The first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with. You must count the time immediately from his death, or the legatee will not receive the annuity annually during her life." Tilghman, J., laid much stress on the word "annually."

But in Hilyard's Estate, 5 Watts & S. 30, the bequest was "in trust to place the same out at interest and pay the interest and income thereof, when and as the same shall be got in and received, unto my sister K., for and during all the term of her natural life." The word "annually" did not occur at all, and yet Sergeant, J., says: "Between Eyre v. Golding and the case before us I perceive no difference. Interest is in its nature an annual profit, and a direction to pay interest makes it payable annually, without anything further." After stating the general rule, he proceeds: "Where, however, it is not a bequest of the corpus, but of an income or annuity, there a contrary rule prevails; and the legatee of interest for life has been allowed it from the death of the testator." It will be observed that, in this connection, "income" and "annuity" are treated as synonymous by Justice Sergeant, and by his reporters in their syllabus, just as "interest payable annually," and "annuity," had been treated by Chief Justice Tilghman and by Mr. Binney in reporting Eyre v. Golding.

Hilyard's Estate was decided after full review of the English chancery authorities, and has been considered as settling the law. It was followed in Spangler's Estate, 9 Watts & S. 135, where Gibson, C. J., says: "Where the corpus of the legacy is interest accruing on a residue after payment of debts, and not the residue itself, it is well settled that unless a contrary intent is collectible from the tenor of the

will, the legatee is entitled to all that is made from the death of the testator." And in Pennsylvania Co.'s Appeal, 41 Leg. Int. 26, the auditor held that there was no difference between "income" and "annuity," and this court affirmed the decision in a per curiam opinion, although in this case, as in Hilyard's Estate, there were expressions in the will which might afford ground for argument that the testator's actual intent was to postpone the commencement of the interest for a period after his death.

These cases are authoritative on the present contention; but, even if they were less so, they should be followed as consonant to sound reason. There is no substantial difference in legal aspect between the gift of an annuity for life and of the interest or income of a fund for life, nor between the gift simply of interest and of interest payable annually. Interest accrues de die in diem, but it is calculated at a rate per annum. In the popular understanding, it is chargeable annually, and payable the same way, unless custom or contract or specific direction makes it payable at shorter intervals. The idea is so clearly implied that the actual use or omission of the word "annual" in the will does not seriously affect the intent and purpose of the testator. To make distinctions which depend not on his intention, but on the skill of his draughtsman, is contrary to reason and sound law, and is not to be encouraged.

Decree affirmed, at cost of appellants.

In re CRANE.

ADAMS v. CRANE.

(Supreme Court of Judicature, Chancery Division. [1908] 1 Ch. 379.)

SWINFEN EADY, J.* Interest from the testator's death is claimed upon the £8,000 trust legacy upon the footing that, although not expressly given, an intention to give it in the shape of maintenance is fairly inferable.

The income, however, of this legacy is not given to any infants for their maintenance, but to an adult person, subject to the obligation on her part of maintaining and educating the infants, and I am not aware of any case in which, under such circumstances, interest has been allowed.

In Leslie v. Leslie, Ll. & G. t. Sugden, 1, which followed Pett v. Fellows, 1 Swans. 561, note, interest from the death was allowed to infant grandnephews, because the fund was expressed to be given "for the use and support of the younger children." And so in In re Richards, L. R. 8 Eq. 119, interest was allowed from the death to certain infant grandnephews of the testator, to whom the testator was

* The statement of facts is omitted.

not in loco parentis, because the will empowered the executors to apply all or any part of the expectant share of any children, or the income thereof, towards his or her education, or otherwise for his or her benefit during minority.

In all these cases the beneficiaries were infants, and the ground upon which interest was allowed was that the testator had impliedly directed that interest should be payable from his death, otherwise there would not be any fund for maintenance.

This rule has not been extended to the case of adults.

In Raven v. Waite, 1 Swans. 553, 559, a sum of £1,600 was bequeathed to trustees upon trust to apply the interest towards the maintenance and support of Frances Raven (the wife of testator's nephew John Raven, from whom she was living separate), and the maintenance, education, and bringing up of her children until the youngest should attain twenty-one, and after that event to pay the income to Frances Raven so long as she remained the wife or widow of her present husband, with a direction that, in case of her death or remarriage before that event, the trustees should take the children under their sole care and management and apply the interest towards the maintenance, education, and bringing up of the children until the youngest should attain twenty-one. The bill was filed by Frances Raven to establish her claim to interest on the £1,600 from the testator's death; but Sir Thomas Plumer, M. R., dismissed the bill. He said that all the cases in which an exception had been admitted to the rule against allowing interest before one year from testator's death had been cases of infants; that no case had been produced in which the exception ever was extended to a legacy in favour of an adult, though cases innumerable must have occurred of legacies to persons aged and decrepit, objects of the testator's bounty during his life. He added: "It is then insisted that this is a provision for the joint benefit of an adult parent and her infant children, and that the exception in favour of the infants must prevail. But the gift here is to the mother, to enable her to maintain herself and her children, and the legacy is payable to her during her life; after her death, indeed, the trustees are to apply it for the maintenance of the children, but the mother is the primary object of the testator's bounty. Such a gift cannot form an exception to the rule."

I therefore decide that the legacy of £8,000 does not carry interest for the period between the testator's death and the dates upon which the instalments of the legacy are paid.

THAYER v. PAULDING et al.

(Supreme Judicial Court of Massachusetts, Worcester, 1908. 200 Mass. 98, 85 N. E. 868)

KNOWLTON, C. J. In the will of Edward Greene, there is a legacy to James P. Paulding of "125 shares of the capital stock of the Rand Drill Company of New York, a corporation, * * * together with all the rights and privileges which may now or hereafter appertain to the same." Within less than one year after the death of the testator, dividends on this stock, amounting to $825.16, were paid to the petitioner as executor, and the question presented is whether these dividends should be paid to the legatee, or used as a part of the general funds of the estate. This involves the question whether the gift of this amount of stock is a specific legacy or a general legacy. If it is a specific legacy it covers this number of shares of stock held by the testator at the time of making his will, together with all their accretions from the time of his death to the time when the legacy should be turned over by the executor to the legatee, namely, to the expiration of one year from the time of the testator's death. If it is a specific legacy there would have been an ademption of it which would have left the legatee with nothing, if the particular property had ceased to exist, or been disposed of by the testator in his lifetime. On the other hand, if it is a general legacy it gave the legatee a right which vested on the death of the testator to have this number of shares delivered to him by the executor at the expiration of a year from the death of the testator, and this right had no reference to any particular shares. If a testator making such a gift had no such shares at the time of his death, or if he had them and for any reason the executor saw fit to sell them soon afterward, in the settlement of the estate, it would be the executor's duty to procure them by purchase before the expiration of a year from the time of the testator's death and then to deliver them to the legatee. Such procurement and delivery would satisfy the requirements of the will. Johnson v. Goss, 128 Mass. 433–436.

It is agreed by the parties that at the time of the execution of his will the testator owned 375 shares of this stock and continued to own them to the time of his death. If we consider that part of the language which purports only to give the stock, disregarding the words "together with," etc., we think it plain on the authorities that they did not create a specific legacy. The number given was only a part of a large number of shares that the testator owned. See White v. Winchester, 6 Pick. 48–52. There was no specification of what part, otherwise than by the quantity. There is no designation, such as the use of the word "my," to confine the gift to any particular shares. John-

son v. Goss, 128 Mass. 433–436; Slade v. Talbot, 182 Mass. 256, 65 N. E. 374, 94 Am. St. Rep. 653; Harvard v. Tufts, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390; Foote, Appellant, 22 Pick. 299; Tomlinson v. Bury, 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464. There is no bequest to the same legatee of both stock and money, such as sometimes has been much relied upon as showing an intention to make the legacy specific. See Metcalf v. Parish, 128 Mass. 370. See, upon the general subject, Tifft v. Porter, 8 N. Y. 516; Sponsler's Appeal, 107 Pa. 95. See Snyder, 217 Pa. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900; Dryden v. Owings, 49 Md. 356; Davis v. Cain, 36 N. C. 304.

If this is to be treated as a general legacy, the question arises whether the words, "together with all the rights and privileges which may now or hereafter appertain to the same," enlarge the gift. We have already referred to the rule that an ordinary legacy is not payable until the expiration of a year from the time of the testator's death, and if the legacy is of money, no interest is payable upon it for that time, even if it is invested and interest upon it is received. Kent v. Dunham, 106 Mass. 586; Ogden v. Pattee, 149 Mass. 82, 21 N. E. 227, 14 Am. St. Rep. 401; Welch v. Adams, 152 Mass. 74–87, 25 N. E. 34, 9 L. R. A. 244. In the case of a mere general legacy of stocks, since a purchase by the executor and delivery to the legatee of the requisite number of shares at the end of the year would satisfy the requirements of the will, he would not be called upon to procure or pay over dividends previously declared and paid to the owner. In reference to such a general legacy the words above quoted from the will would add nothing. They would be nothing more than a tautological and unnecessary statement, meaning that the stock should be perfect in its qualities as stock, without impairment in any way, and conveyed by a perfect title to give the legatee all the advantages that could belong to any owner. The words are more pertinent to a gift of a specific legacy than to a gift of a general legacy, although a gift of a specific legacy without these words would include all rights and privileges pertaining to the specific thing given, which accrued or existed after the death of the testator. They seem to point to some particular stock in the mind of the testator, referred to by the words "the same."

We regard the question whether this last clause is sufficient to change what would otherwise be a general legacy into a specific legacy, as the only difficult question in the case. A very slight indication of an intention to give shares then in his ownership is enough to make the legacy specific in a case like this. On the whole, we think the words should be considered as referring to this number of shares of the stock then owned by the testator, and as requiring that they be set apart and, at the end of the year, turned over to the legatee with any increment accruing from them after the testator's death. All the language of the will should be considered together and given effect.

We are of opinion that the testator intended by this clause to give a specific legacy. The dividends are to be paid to James P. Paulding. So ordered.[8]

In re PEARCE.

CRUTCHLEY v. WELLS.

(Supreme Court of Judicature, Chancery Division. [1909] 1 Ch. 819.)

Adjourned summons.

The testator, Sir W. G. Pearce, Bart., bequeathed to his wife all his furniture and effects, horses, carriages, motor cars, yacht, and jewelry, and gave his residuary estate to the plaintiffs, his executors and trustees, upon trust to pay the income thereof to his wife during her life, and after her death upon trust, in the events which happened, for Trinity College, Cambridge, absolutely.

The testator died on November 2, 1907, and his will and codicils were proved by the plaintiffs on December 18, 1907; the gross value of his estate being sworn at the sum of £469,764 12s. 2d.

The testator's widow died on December 23, 1907, having by her will appointed the defendants, S. R. Wells and G. G. Vertue, her executors, who proved her will on March 28, 1908.

After the death of the testator the plaintiffs incurred considerable expense in retaining a large part of the staff of men and women servants in one of the testator's houses in order to maintain and keep in good order the furniture and effects thereof, and to look after the

[8] Compare Snyder's Estate, 217 Pa. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900 (1907); Jewell v. Appolonis (N. H.) 74 Atl. 250 (1909); Allen v. Allen (N. J. Ch.) 74 Atl. 274 (1909). In the latter case the important question was whether the legacy was specific or demonstrative. "A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death." Kindersley, V. C., in Mullins v. Smith, 1 Drew. & S. 204 (1860). "In deciding whether a legacy is specific or general [or demonstrative], the intention of the testator must control, as it must the decision of every other question involving the construction of wills. There is no technical, arbitrary rule requiring the use of particular words or expressions to make a bequest specific. Such intention may be manifested either by clear words, or by the general scope and texture of the instrument; but in the latter case, in the language of Lord Eldon, the inference should rest upon a strong, solid, and rational interpretation of the will." Van Fleet, V. C., in Wyckoff v. Perrine's Ex'rs, 37 N. J. Eq. 118 (1883).

"We regard it as a well-settled canon of interpretation that a bequest of a stated number of shares of stock of a designated corporation, without any reference to the particular shares intended to be bequeathed, is not specific, but general." Savage, J., in Palmer v. Palmer's Estate (Me.) 75 Atl. 130, 132 (1909).

On whether a bequest of stocks, bonds, or notes, is general, specific, or demonstrative, see 11 L. R. A. (N. S.) 49, note.

On the right to dividends as between the executor and the specific legatee of stock, see 45 L. R. A. 393, 394, note.

On the necessity and effect of assent by the executor to a legacy, see 50 Am. Dec. 485, note.

horses and carriages specifically bequeathed by the testator to his wife, and in paying the wages and expenses of the captain of the yacht, and in repairs to the yacht.

The plaintiffs assented to the different specific bequests at various dates between March 23, 1908, and May 14, 1908.

Subsequently the plaintiffs took out this summons for the determination of the question whether the estate of the testator's widow should bear any, and what, part of the costs of the upkeep, care, and preservation of the furniture and effects, horses and carriages, and yacht.

EVE, J., stated the facts, and continued: The question which I have to decide is whether the moneys which have been expended ought to come out of the general estate or ought to be borne by the specific legatee. Now it seems to be settled law that when an executor gives his assent to a specific legacy the assent relates back to the death of the testator, and the specific legatee is entitled to the profits accrued due from the time of the testator's death. That being so, it seems to me to be right and fair that the specific legatee should be charged with the costs of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent, and I shall make a declaration to that effect, and direct an inquiry what expenses were properly incurred in and for such upkeep, care, and preservation.

SECTION 2.—THE ABATEMENT OF LEGACIES AND DEVISES

In re TUNNO.

RAIKES v. RAIKES.

(Supreme Court of Judicature, Chancery Division, 1886. 45 Ch. D. 66.)

Caroline Tunno by her will bequeathed her diamonds to her trustees upon trust for sale, and out of the proceeds to lay out £600 in repairing a certain parish church, and to lay out £700 in the building of six laborer's cottages. The will contained a residuary bequest. The diamonds realized a little over £900. The gift of £700 for laborer's cottages having been declared void, the residuary legatee claimed that the £600 legacy must abate with the £700, as the £900 proceeds would not pay both.

CHITTY, J.[9] Then a further point is raised, which is this: It is said on behalf of the residuary legatee that as the gift of £700, to be paid out of the proceeds of sale of the diamonds, has failed, there is a lapse for the benefit of the residuary legatee. The diamonds did

[9] The statement of facts is rewritten and abbreviated.

not produce £1,300, but only about £900, and the argument on behalf of the residuary legatee is that this £600 legacy must abate; the vicar and churchwardens thus taking six-thirteenths of the £900 only. It is plain that as between the legatee of the £700, had that legacy taken effect, and the legatees of this £600, there must have been an abatement in the proportions named; but it does not follow that the residuary legatee can therefore claim seven-thirteenths of the £900. It is clear that if a specific property is given in trust for A. and B. as tenants in common in equal shares, and B. dies in the testator's lifetime, A. takes only one-half of the property; and it is equally clear that the same result follows whatever be its fractions in which the property is divisible among the specific legatees. It is clear, too, that if property be given upon trust for sale, with a direction to divide the proceeds into aliquot portions, the gift intended in each case is that of a specific proportion only of the fund which the testator is disposing of, and the argument on behalf of the residuary legatee proceeds on the assumption that on the true construction of this will there is a gift to these two legatees of aliquot portions of the proceeds of sale of the diamonds. It is plain to my mind that that is not the true interpretation of his gift. It is not as if the testatrix had said: "I direct my diamonds to be sold for not less than a sum of £1,300, and I thereout give £600 to the church, and £700 to some one else." That would have amounted to a gift of the fund in specific proportions; but she has not done that.

The foundation of the argument for the residuary legatee is the well-known case of Page v. Leapingwell, 18 Ves. 463. In that case the sum of the gift, to put it quite shortly, was: I distribute £10,000 in aliquot proportions among certain named legatees, with a gift over of the overplus moneys arising from the sale, upon certain trusts; and on the question of construction as to the meaning of the word "overplus," Sir William Grant held that it was equivalent, in that case, to a sum of £2,200, being the fractional remainder of the sum of £10,000; for the testator in that case, having directed a sale for not less than £10,000, Sir William Grant held that there was in substance a division of that sum, in specific or aliquot portions, among named legatees, who were to take as tenants in common in the proportions named, and it followed that if any one of them died in the lifetime of the testator, or if for any other reason the gifts to any of them failed, such event did not increase the benefit intended to be given to the other tenants in common.* That decision has no application to the present case. To my mind, it is not open to argue on the construction of this will, that there is a gift here in fractions or aliquot proportions, of the proceeds of sale; it contains no statement of the amount of the fund to be disposed of, nor of the sum for which the diamonds are to be sold, nor is there, in terms, any gift of the over-

* Compare Van Nest v. Van Nest, 43 N. J. Eq. 126, 13 Atl. 179 (1887), where a gift of "the remaining $800" of $1,300 was held not to be residuary, but to abate equally with the $500 given before.

plus, in the event of the jewels realizing more than £1,300. Had the diamonds realized £2,000, no disposition is made in the will of the surplus, except in so far as such surplus would be swept up by the general residuary gift. It is clear that, if these jewels had sold for say £2,000, the legatees of this £600 would not have taken any more than £600. They could not have claimed six-thirteenths of the £2,000.

In the result, the gift here is, to take a simple illustration, the same as if a testator were to give all the consols he was possessed of at his death upon trust for sale, and thereout to pay a legacy of £600 to A., and another legacy of £700 to B., in which case, there being no priority between the two, if the consols turned out to be insufficient, abatement would be necessary; but in any case the charges on the consols would have to be paid before the residuary legatee could come in. The argument for the residuary legatee in this case appears to me to be an attempt to creep into the shoes of the legatee of the £700 as if that legacy had taken effect; but this legacy has failed, and the residuary legatee is entitled to claim, not the legacy of £700, but only so much of the proceeds of sale of the diamonds as is not required to satisfy the £600 legacy; in other words, the residuary legatee can take nothing until this specific charge of £600 has been satisfied.

It is not necessary for me further to consider the authorities. The result is, I hold that the contention of the residuary legatee fails, and that this £600 legacy must be paid in full.[10]

Appeal of ARMSTRONG.

(Supreme Court of Pennsylvania, 1869. 63 Pa. St. 312.)

SHARSWOOD, J.[11] It was settled in England by Long v. Short, 1 P. Wms. 403, that specific devises of land and specific bequests of personalty must abate ratably in case of a deficiency of assets for the payment of the bond debts of the testator, because both lands and chattels were liable in law for those debts, and it was equally the intention of the testator that the legatee should have the chattel, and the devisee the land. 1 Roper on Legacies, 254. In this state, where lands have always been assets for the payment of debts by simple contract as well as by specialty, the rule is general—that wherever there

[10] "I come to the conclusion when an estate has been so depleted by the devastavit of an executor or trustee that there are not funds enough to pay the specific legatees in full, whatever there is must be devoted to the payment of such legatees to the exclusion of the residuary legatees. There is no residuary estate to be distributed." Clarke, J., in Farmers' Loan & Trust Co. v. McCarthy, 128 App. Div. 621, 625, 113 N. Y. Supp. 207, 209 (1908). See, also, Buffalo Co. v. Leonard, 154 N. Y. 141, 47 N. E. 966 (1897), where on a devastavit by the executor the residuary legatee was made to refund, so that pecuniary legatees might be paid. But see note to Anonymous, post, pp. 682, 683.

[11] The statement of facts is omitted, and part only of the opinion is given.

is a deficiency of assets to pay both debts and legacies, specific devisees and specific legatees shall contribute proportionably. What is termed a demonstrative legacy, partakes, in this respect, of the privilege of a specific legacy. A demonstrative legacy is the bequest of a certain sum of money, with a direction that it shall be paid out of a particular fund. It differs from a specific legacy in this respect: That if the fund out of which it is payable fails for any cause, it is nevertheless entitled to come on the estate as a general legacy. And it differs from a general legacy in this: That it does not abate in that class, but in the class of specific legacies. 1 Roper on Legacies, 153. It is settled by this court that, in the marshaling of assets for the payment of the debts of a testator, specific devises of land abate proportionably with specific and demonstrative legacies. Barklay's Estate, 10 Pa. 387; Hallowell's Estate, 23 Pa. 223.

The legacy to Mrs. Rea falls clearly within the class of demonstrative legacies. By the will the sum of $1,200 was to be paid to her out of the proceeds of the mill property, and by the codicil she was to have in addition, out of the proceeds of the sale of the mill, bank stock, and other personal property, a sum sufficient to make her equal to her sister Elizabeth, in the amount which the testator had loaned and paid to her husband. There is certainly nothing in the will to evince a different intention. On the contrary, the testator carefully provides that if the sale of his mill property should not produce sufficient to pay the sums bequeathed to his daughters respectively, they were to be paid out of his estate in general; which strongly implies a preference and priority to them, and that their legacies were to be paid to them at all events. Duncan v. Alt, 3 Pen. & W. 382. To apply any less favorable rule to Mrs. Rea than that which was adopted in this case would most clearly disappoint the intention of the testator, "and cut up his plan of distribution by the roots." While the other devisees and legatee would receive their bequests in full, the entire loss would fall on Mrs. Rea as effectually as if she had been a mere residuary legatee and postponed to them all. * * *

Decree [confirming the auditor's report deciding that Mrs. Rea's legacy abated proportionately with specific devises and bequests] affirmed, and appeal dismissed, at the costs of the appellants.[12]

[12] In Kelly v. Richardson, 100 Ala. 584, 599, 13 South. 785, 791 (1893), it is said: "It is the policy of our laws that both real and personal property are equally liable for the debts of decedent, and that realty devised and personalty bequeathed shall, where the devise and legacy are of the same character, abate ratably when there is a failure of assets undisposed of by the will to pay debts. It is in keeping with this policy that the rule by which specific legacies and specific devises are abated ratably by the necessities of contributions to the debts of the estate has come to be established. It follows logically from this policy and this rule in respect to specific dispositions of realty and personalty respectively that general devises shall contribute ratably with general legacies to debts and expenses of administration, and we so hold" (McClellan, J.). See, also, Estate of Woodworth, 31 Cal. 595 (1867).

GELBACH v. SHIVELY.

(Court of Appeals of Maryland, 1887. 67 Md. 498, 10 Atl. 247.)

ALVEY, C. J. This case was brought to obtain a judicial construction of the will of George Gelbach, Jr., deceased, and to have determined the rights of certain parties thereunder. George Gelbach, the testator, died in Feb. 1880, leaving a widow and two children, and four grandchildren, all provided for in his will, which was duly admitted to probate. The father of George Gelbach, Jr., had died in 1879, leaving three children, including George, as his only heirs and distributees, and he left a small estate, consisting of real and personal property in Pennsylvania, where he died, and some real property in the City of Baltimore.

George Gelbach, Jr., by his will, after giving some few legacies, made the two following bequests:

"Item. I give and bequeath out of the portion or share of my father's estate that may come to me, one thousand dollars to my brother, Joseph Gelbach."

"Item. I give and bequeath (out of the share or portion of my father's estate that may come to me) one thousand dollars to my sister, Elizabeth Shively."

He then devised and bequeathed all the rest and remainder of his estate, real and personal, to be divided into three equal parts, one of

In some jurisdictions residuary devises are treated as specific devises. See Lancefield v. Iggulden, post, p. 669.

While by the general rule specific devises and specific legacies must abate pro rata, a few jurisdictions make specific legacies abate before specific devises. See Gordon v. James, 86 Miss. 719, 755, 39 South 18, 25, 1 L. R. A. (N. S.) 461 (1905), where the court says: "The true rule is that upon an insufficiency of the personal estate, which is primarily liable to the debts, the specific bequests must abate proportionately, even to the extent of complete destruction, before the devisees, to whom lands have been specifically devised, can be called upon to contribute." The same reasoning would require in such states that residuary personalty be taken before residuary realty, even though the gift of the residue of realty be not regarded as a specific devise. See Hamlin v. Mansfield, 88 Me. 131, 33 Atl. 788 (1895). Compare McGlaughlin v. McGlaughlin, 24 Pa. 20 (1854). That general legacies must abate or be postponed until payment in full is made of demonstrative legacies, see Baptist Female University v. Borden, 132 N. C. 476, 44 S. E. 47, 1007 (1903); Gelbach v. Shively, next post. On order of abatement as between demonstrative legacies and specific legacies and devises, see 4 L. R. A. (N. S.) 922, note. On demonstrative legacies, see 4 Prob. Rep. Ann. 687, note.

The English rule is stated by Jarman as follows: "The order of the application of the several funds liable to the payment of debts, then, is as follows: (1) The general personal estate not expressly or by implication exempted. (2) Lands expressly devised to pay debts, whether the inheritance or a term carved out of it be so limited. (3) Estates which descend to the heir, whether acquired before or after the making of the will. (4) General pecuniary legacies pro rata. (5) Real or personal property devised or bequeathed, either to the heir or a stranger, charged with debts, and disposed of, subject to such charge. (6) Specific legacies and real estate devised, whether in terms specific or residuary, are liable to contribute pro rata. (7) Real or personal property over which the testator has a general power of appointment, and which

which parts he gave to his wife absolutely, and the other two-thirds he gave to his two children in equal parts, in trust for life, with remainder to their children.

The estate of the father of the testator was settled after the death of George, and the proceeds of that estate, both real and personal, (with the exception of some railroad stock, distributed in the lifetime of George,) were distributed, and the portion thereof distributed as George's share was paid over in equal parts to Joseph Gelbach and Elizabeth Shively, on account of the legacies to them under their brother's will. The amounts received, however, from the estate of the father, was not equal to the amount mentioned in the bequests to them by the brother; and they now claim that the balance of such amounts shall be made up from the general personal estate of George, the testator. And whether such claim can be maintained, depends upon the nature and distinctive character of the bequests—whether they are so far of a specific character as to be exclusively dependent for their payment upon the sufficiency of the estate or fund referred to as the source of payment, and out of which the amounts were given, or whether they are of the character denominated demonstrative legacies.

Ordinarily, a legacy of a sum of money is a general legacy; but where a particular sum is given, with reference to a particular fund for payment, such legacy is denominated in the law a demonstrative

he has appointed by his will." 2 Jarman on Wills (6th Ed.) 1430–1432. See Manning v. Spooner, 3 Ves. Jr. 114 (1796).

But in Maitland's Equity and the Forms of Action at Common Law, 208, Jarman's No. (5) is placed before his No. (4). Maitland says: "Doubt was occasioned by the case of In re Bate, 43 Ch. D. 600, as to which ought to go first, realty charged with the payment of debts or a pecuniary legacy. Kay, J., held that the pecuniary legacy must go first, but, semble, wrongly; and in the later cases of In re Salt, [1895] 2 Ch. 203, and In re Roberts, [1902] 2 Ch. 884, it was decided that where a will contains a general direction for payment of debts the pecuniary legatees are entitled to have the assets marshaled against specific devisees of the real estate. Then note that a lapsed share of residue is not applicable before other shares. I give all my personalty to A., B. and C. in equal shares. (A., B. and C. are not descendants of mine. Those of you who have read the Wills Act [1837, § 33] will know why I make this remark.) A. dies during my lifetime, so his share lapses to my next of kin. The three shares must contribute equally to the payment of my debts. You are not to throw the debts on to the lapsed share for the benefit of the other shares. Threthewy v. Helyar, 4 Ch. D. 53."

In French v. Vradenburg's Ex'rs, 105 Va. 16, 52 S. E. 695, 3 L. R. A. (N. S.) 808, 115 Am. St. Rep. 838 (1906), also, Jarman's classes (4) and (5) are transposed. Then follows: "(6) Specific legacies; (7) real estate devised by the will." In that state, "when legacies are to be used to pay debts, the first liable is the residuary legacy (2 Lomax on Executors, 126), and the next are the general pecuniary legacies, then the specific legacies, and lastly the real estate devised by the will." Fauntleroy, J., in Edmunds' Adm'r v. Scott, 78 Va. 720, 729 (1884). In In re Martin, 25 R. I. 1, 54 Atl. 589 (1903), the court sets apart: (1) The general or residuary estate; (2) general legacies and general devises; (3) specific legacies and specific devises not subjected to a testamentary charge of debts.

On the personal liability of devisees for charges imposed by the will, see 129 Am. St. Rep. 1056, note. On when legacies are charged on land, see 12 Prob. Rep. Ann. 309, note, and Fries v. Osborn, 190 N. Y. 35, 82 N. E. 716, 19 L. R. A. (N. S.) 457 (1907).

legacy; and such legacy is so far general, and differs so materially in effect from one properly specific, that if the fund be called in or fail, or prove to be insufficient, the legatee will not be deprived of his legacy, but he will be permitted to receive it out of the general assets of the estate. Dugan v. Hollins, 11 Md. 77. But such legacy is so far specific that it will not be liable to abate with general legacies, upon a deficiency of assets, except to the extent that it is to be treated as a general legacy, afer the application of the fund designated for its payment. Mullins v. Smith, 1 Drew. & Sm. 204; 2 Wm's Ex'rs, 995.

The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or as one dependent exclusively upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. Creed v. Creed, 11 Cl. & Finl. 509. For although the personal estate of the testator is the primary fund for the payment of legacies generally, particular legacies may be so provided for as to be charged upon a particular fund or estate exclusively. As was said by the Lord Chancellor, in Saville v. Blacket, 1 P. Wms. 779, "it is possible for a legacy to be charged in such manner upon a certain fund, as that upon its failing, the legacy shall be lost."

Here, the bequest is of a $1,000 out of the testator's share or portion of his father's estate. Does this amount to anything more than a testamentary assignment or relinquishment of the testator's interest in his father's estate, to the extent of the legacies mentioned, in favor of his brother and sister, if his interest should prove to be of that amount? The language of the bequests would seem clearly to negative the idea that the testator intended that any portion of these legacies should be paid out of his general personal estate (apart from that acquired from his father); and he manifestly supposed that his share in his father's estate would be sufficient to pay the amounts mentioned by him. The amount necessary to pay the balance of these legacies, if they are to be paid out of the general personal estate of the testator, would have to be raised out of the portions given to the testator's wife and children; and we are clearly of opinion that such result would contravene the intention of the testator, as manifested in the general scheme of the will, and by the terms of the bequests themselves.

It is certainly true, as a general proposition, as was said by the Vice Chancellor in Dicken v. Edwards, 4 Hare, 276, that where a testator bequeaths a sum of money in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund. But where the legacy is so specific and so connected with the fund appointed for its payment as to give rise to the inference that the legacy would not have been given but for the fund as a means of payment, there the legacy will fail with the failure of the fund. Mann v. Copland, 2 Madd. 223, 226; Dicken

v. Edwards, 4 Hare, 276; Creed v. Creed, 11 Cl. & Fin. 509. See, also, Hancox v. Abbey, 11 Ves. 179.

In our opinion it is clear, that the legacies given to the brother and sister are not general legacies in the sense that they are, to any extent, payable out of the general personal estate of the testator, apart from the fund out of which they were made payable; and that, to the extent of the deficiency of that fund to pay such legacies in full, they must fail.

It follows that the decree of the 28th of March, 1887, requiring the balance supposed to be due on the two legacies mentioned to be paid out of the general assets of the estate, must be reversed, and the cause be remanded.

Decree reversed, and cause remanded.[18]

HAYS v. JACKSON.

(Supreme Judicial Court of Massachusetts, 1809. 6 Mass. 149.)

The petitioners alleged, and proved by the requisite documents from the probate office, that the personal estate of the testator was insufficient, by the sum of $66,000, for the payment of his just debts and legacies, and thereupon prayed that they might be licensed to convey so much of the real estate, of which he died seised, as should be sufficient to pay these debts and legacies, with the charges of sale.

Upon notice ordered, the heirs at law appeared, and sundry questions arose, all of which are discussed in the following opinion of the court, which was delivered by

PARSONS, C. J. Henry Jackson made his last will on the 13th of January, 1805, in which he makes the following dispositions of his estate:

First. After all his just debts and funeral charges are paid, he gives to such of his nephews and nieces as may survive him, fifty dollars each. Also he gives to his sister Susanna Gray, in fee, certain specific real estate, on condition that she does not demand against his estate her portion of her father's estate remaining in his hands; and his executors are to hold the real estate, thus devised her, upon the same trusts as he held her said portion.

Also, he gives to Mrs. Hepzibah C. Swan, in fee, all the remaining part of his estate, real and personal, of which he might die seised, or which might afterwards descend to him, by gift, grant, as heir at law, or otherwise, to be held in trust by his executors, for her sole use and disposal.

[18] See Byrne v. Hume, 84 Mich. 185, 47 N. W. 679 (1890); Id., 86 Mich. 546, 49 N. W. 576 (1891).

On the order of abatement to pay debts as between demonstrative legacies and specific legacies or devises, see 4 L. R. A. (N. S.) 922, note.

And he appoints Judah Hays and Elisha Sigourney, his executors.

Mrs. Swan, the residuary legatee, and also the heirs at law, are before us.

The testator was seised of other real estate than that specifically devised to Mrs. Gray, when he made his will; and he afterwards acquired other real estate, which, on his death, without a republication of his will, descended to his heirs.

It appears that the personal estate, left by the deceased, is insufficient to pay all his debts. The heirs contend that the lands, which would pass by the residuary devise to Mrs. Swan, shall first be applied to the payment of the debts, before the descended lands can be called for. On the other side, Mrs. Swan and the executors, who are her trustees, insist that the descended lands are first to be appropriated to the payment of the debts.

Whether we are authorized, on this petition, to marshal the assets, and if we are, in what manner they are to be marshaled, are the questions before the court.

The case may at first be considered as at common law, and according to the equitable rules established for marshaling assets, where there is a will.

At common law, the lands of a testator are not assets, in the hands of the heirs, for the payment of any but specialty debts, where the heir is expressly bound by the contract. And his lands are not bound for the payment of any of his debts in the hands of a devisee, unless charged by the testator, either generally or specially, in his will. To prevent the injustice of the testator in devising his lands without charging them with the payment of his debts, the statute of 3 & 4 W. & M. c. 14, was passed, by which the lands in the hands of a devisee are made assets for the payment of debts due on specialties. Since that statute, all the lands of the testator, whether they descend or are devised, are charged by law with the payment of creditors by specialty, who may also resort to the personal estate. But creditors by simple contract can avail themselves only of the personal estate, and of such of the lands as are charged in the will with the payment of debts; unless when they take the place of creditors by specialty, who have been paid out of the personal estate. These rights of the creditors remain uncontrolled by any provisions which a testator can make.

But as between legatees and devisees who claim under the will, and the heirs who can take only what the testator has not given away, he may regulate the funds, out of which his debts shall be paid, by which regulations they will be bound.

And the general rule in equity for marshaling assets is thus settled: (1) The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts. (2) The real estate which is appropriated in the will as a fund for the payment. (3) The descended estate, whether the testator was seised of it when the will was

made, or it was afterwards acquired. (4) The rents and profits of it, received by the heir after the testator's death. And (5) the lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose. And this rule is executed by a decree in chancery, according to the rights of the parties respectively interested.

The laws of this commonwealth, applicable to this subject, may next be considered. And here all the personal estate of the testator, and all the real estate, of which he died seised, whether devised or not, are assets for the payment of all his debts, whether due by simple contract or by specialty. Also by St. 1783, c. 24, § 10, all estate, real or personal, undevised in any will, shall be distributed as if it were intestate, and the executor shall administer upon it as such.

A question has been made, whether the executor must take out administration on such undevised estate, or whether he shall administer it, ex officio, as executor. The usage has been to administer it without a letter of administration; and we are satisfied that this usage is correct. There can be no benefit to any person, from having two accounts opened by the executor in the probate office; and the natural construction of this section supports the usage. For the executor, by the probate of the will, has the administration of the testate estate, according to the will, and on undevised estate he is also directed to administer agreeably to the provisions respecting intestate estate.

According to the strict rules of law, there can be no undevised personal estate in a will, where an executor is appointed; for he has all the personal estate, whether acquired before or after the will, in trust, first, to pay the debts, and then the legacies, and if any remained, it was his own, unless the testator, by his provision for the executor, had excluded him from it, in which case he was trustee of the remainder for the next of kin.

As questions frequently arose, whether the executor was excluded from the residue or not, the section of the statute above cited removed all doubt; and the executor is now, in all cases, trustee of the undisposed residue for the next of kin.

As to the distribution of undevised lands, this section is merely affirmative of the common law, which gives to the heir all undevised estate. But by the obligation imposed on the executor to administer it as intestate estate, it becomes assets in his hands for the payment of the testator's debts; and it may be sold by the executor, on license for that purpose, or a creditor may take it in execution.

There is another provision, applicable to this subject, in the eighteenth section of this statute, where it is enacted, that whenever a testator in his will shall give any chattels or real estate to any person or persons, and the same shall be applied to satisfy the debts of the testator, all the other legatees, devisees, or heirs, shall refund their proportionable part of such loss, and contribution may be compelled by suit.

From this view of our statute provisions, it is manifest that a testator cannot, by any dispositions in his will, affect the rights of creditors, who may, if their debts are not discharged, enforce satisfaction by the levy of their executions on any estate, which was the testator's at his decease; the whole of it being assets in the hands of the executor. But it is also manifest that the testator may bind, by his dispositions, his legatees, devisees, and heirs.

Hence result the right and duty of the court, in the due exercise of its jurisdiction, so to marshal the assets, that as little interruption be given to the interests of the claimants under the will, and of the heirs, as may consist with the more perfect rights of creditors. This can be done only by a designation in the license of the estate, which the executor may sell for the payment of debts. And when the testator, or the law, has appropriated an adequate fund for the payment of the debts, it would be unreasonable for the court to permit that fund to lie by, and to license an executor to sell a specific devise, and thus drive the specific devisee to his action at law, for relief out of the appropriate fund.

In what manner the assets are in this case to be marshaled, is the next question. And in our opinion, the rule established in equity, in cases where all the debts are due by specialty, is applicable in this case, except as it relates to the rents and profits of the descended estate, received after the testator's death, which we cannot come at. For in those cases, the whole estate, personal and real, as well the devised as the descended lands, are assets for the payment of all the debts. So here the whole estate of Jackson, the testator, including the descended real estate, is assets for the payment of all his debts, in the hands of his executors. And in both cases the charge on the estate is by operation of law.

In this will there is no specific bequest of any chattel, and no exemption of any part of the personal estate from the payment of debts. Therefore the whole of the personal estate, after the payment of the expenses of the last sickness, funeral charges, and of the debts due to the government (if any), is first to be applied to discharge the debts. It is also very clear, that the devise of lands to Susanna Gray is a specific devise, not liable, by the terms of it, to any deduction. The descended estate must then be applied to the payment of the debts, before the specific devise can be resorted to. And the same rule must apply to the lands which Mrs. Swan can claim as residuary legatee, if the devise of those lands can be considered as specific within the intention of the rule.

Jackson first provides that his debts and funeral charges be paid. He next bequeaths legacies to his nephews and nieces, and makes a specific devise to his sister, Susanna Gray. Then he gives to Mrs. Swan, in fee, all the remaining part of his estate, real and personal; the just construction of which is, "when my debts and funeral charges, and the legacies, are paid, and the specific devise to my sister is de-

ducted, then what remains, whether real or personal, I devise in fee to Mrs. Swan." If nothing should remain, then nothing is devised to her.

We cannot therefore consider this devise of the remainder as specific. It is rather creating a fund for the payment of the debts and legacies, with a devise of what remains, if any, to the residuary devisee. If, after the personal estate was exhausted by the debts, the unsatisfied creditors should levy their executions on all the devised lands, excepting those specifically devised to Mrs. Gray, Mrs. Swan could not compel contribution by Mrs. Gray and the heirs, under the statute, because a general residuary legatee cannot have contribution, if nothing remains. For in that case nothing is given to him, but on a contingency that some estate may remain; and if no estate shall remain, then nothing devised to him is taken from him, to satisfy a creditor of the testator. The debts and legacies, being first to be paid, are to be considered as a deduction from the property contemplated to be given; and if, after the deduction, there is no remainder, the contemplated bounty has wholly failed, there being, in fact, no object on which it could operate.

Thus, when the testator, after mortgaging lands, devised them, with a clause, that the devisee pay off the mortgage, he can resort to no other part of the estate for relief; but the money secured is considered as a deduction from the property devised. But the case of King v. King et al., 3 P. Wms. 358, is in point. There the testator, being seised of freehold lands, and of a copyhold, which last he had mortgaged, devised the copyhold to his nephew; and after all his debts were paid, he devised the rest of his estate, real and personal, to his son, who was his heir. And it was holden that the import of this devise was, that until all the debts were paid, nothing was devised to the son; or that when the debts should be paid, then, and then only, he should be entitled to the residue. We cannot, therefore, consider this residuary devise to Mrs. Swan as specific, within the rule of marshaling assets, so that the descended lands shall first be sold.

It has been argued by the counsel for the petitioners, admitting the rule to be generally correct, yet that in this case it ought not to apply, because in the residuary devise the testator gives, not only all his real and personal estate, of which he was then seised and possessed, but all of which he might afterwards die seised; and, therefore, that he contemplated after-acquired estate, which, although it could not pass by his will, yet was evidently intended to pass; and that this intent ought to be so far executed as to cause it to be sold for the payment of debts, before the residuary devise should be applied for that purpose.

This argument, however ingenious, is not solid. For the testator cannot, in his will, charge with the payment of his debts after-purchased lands, any more than he can devise them. And if in this case he intended it, the intent was void. And an intent against law cannot

affect this rule or principle of law. Otherwise the rights of the heirs would be implicated by a testamentary disposition, made before the lands were acquired by the testator. If this case should be allowed as an exception, it would involve most residuary devises; for it is common for the scrivener to include expressly all the residue of the estate, of which the testator may die seised or possessed. We think, therefore, that the rule should be applied in this case, without admitting the exception.

The order of the court was entered as follows:

Ordered that the said executors be, and they hereby are empowered and licensed to raise the sum of $——— by sale at public auction of the houses, lands, or tenements, of which the said Henry Jackson died seised in fee, being devised by him by his last will and testament, excepting such part thereof as is therein devised in trust for his sister, Susanna Gray, and such as may have been held by said Jackson to the use of, or in trust for, any other person or persons, the said sum, when raised, to be applied to the payment of the debts aforesaid, with the incidental charges of sale; and if the said sum cannot be raised by such sale, it is further ordered, that the said executors may raise by sale at public auction of so much of the real estate of which the said Jackson died seised, not having devised the same in and by his last will and testament, such further sum of money, as with the money raised by the sale first above ordered, will amount, in the whole, to the said sum of $——— to be applied as aforesaid, giving bond, etc.

BIEDERMAN v. SEYMOUR.

(High Court of Chancery, 1841. 3 Beav. 368.)

See ante, p. 467, for a report of the case.

LANCEFIELD v. IGGULDEN.

(Court of Appeal in Chancery, 1874. L. R. 10 Ch. App. 136.)

The personal estate having been found insufficient for payment of the testator's debts, two questions were argued when the cause came on for further consideration. The first was whether specifically devised estates were liable to contribute ratably with the residuary real estate to meet the deficiency of the personal estate.

The Vice Chancellor (Law Rep. 17 Eq. 556) held that the specifically devised estates were not liable to contribute till the real estate comprised in the residuary devise had been exhausted. From this decision the defendants appealed.

LORD CAIRNS, L. C.[14] Independently of the state of the law before

[14] The statement of facts is abbreviated, and part of the opinion of Lord Cairns and the concurring opinion of Sir W. M. James, L. J., are omitted.

the Wills Act, independently of the Wills Act, and independently of the construction of this particular will, I should have thought that in all cases there would have been a very strong presumption of an intention on the part of the testator of this kind; that if a man bequeaths a specific portion of personalty to one person and the residue to another person; and if he devises Whiteacre to one person and Blackacre to another, and the residue of his real estate to a third, a different conclusion would be arrived at as to his intention with respect to the payment of his debts in the second case to that which would be arrived at in the first case; because it appears to me that, from the well-known habits of mankind, as every one expects to owe some debts at his death, and expects that his personal estate will be the primary fund for payment of his debts, a man who gives a specific legacy to one person and the residue to another may well suppose that the usual rule of law will apply, and that his debts will be paid out of the residue; but that as to the real estate, there being little expectation that the real estate would be resorted to for payment of debts, a man who devises Blackacre to one person and Whiteacre to another, and the residue to a third, may well be supposed to do so under the belief that he was not only benefiting the specific devisees to the extent of the estates devised to them, but also the residuary devisee to the extent of the residue given to him.

But when I look at this particular will, there appear to me well marked reasons for supposing that this view is in accordance with the testator's intention. For the testator having three sisters married and one unmarried, he portions out his real estate among them by giving specific devises to the married sisters and their families, and the residuary real estate to the unmarried sister, and then gives the residue of his personal estate, after payment thereout of his funeral and testamentary expenses and debts, to the same sister. It is impossible not to see that whether the rule of law was present to the testator's mind or not, he anticipated that the residue of the personalty would be the fund out of which the debts would be paid. So far, therefore, as this particular will is concerned, there is nothing to lead us to the conclusion that the residuary real estate was intended to be liable to the debts in preference to the specifically devised estates.

Then as to the question of law. Before the Wills Act the rule of law was as well settled as any rule of the court, that a residuary devise of real estate was treated as specific, and although the items were not specified, it was considered quite as much specific as if they had been specified. The result of this general rule of law was, that after-acquired real estate would not pass under a general devise. Then the Wills Act stepped in. It was competent for the Legislature to have said that real estate should be treated like personal estate for all intents and purposes; but this was not done. The provisions of the act were most carefully framed, not by way of altering philosophically the general rules of law, but by taking each particular evil

intended to be cured, and dealing with it separately by particular enactments. The Legislature had to deal with the question of a will passing after-acquired property, and it has dealt with it by the twenty-fourth section. That section enacts that "every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

The effect of that is, as Lord Westbury on one occasion expressed it, that the Legislature attributed to the will a continuing operation as if the devise were repeated every moment until the testator's death; so that as to all the property it must be taken as if he made it the moment before his death. If we realize this hypothesis of the Legislature, the result is that this residuary devise must be taken as having been made the moment before the testator's death, but as a devise specific in its nature. There is nothing in the Act to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank pari passu with the specific devises.

Then with regard to the state of the authorities, * * * I feel bound to say that * * * Hensman v. Fryer, Law Rep. 3 Ch. 420, decided by Lord Chelmsford, * * * was a distinct expression of opinion by the judge who was then the head of this court, that the Wills Act had made no alteration in the law in this respect. Therefore, both on principle and authority, I feel bound to come to a different conclusion from the Vice Chancellor in this case, and his decree must be altered accordingly.[15] * * *

MORISEY v. BROWN et al.

(Supreme Court of North Carolina, 1907. 144 N. C. 154, 56 S. E. 704.)

CONNOR, J.* The principles controlling the decision of this case are simple and well settled. "The real estate of the testator specifically devised is never charged with the payment of legacies, unless either the intention to charge pecuniary legacies upon it is expressly

[15] See Rice v. Rice (Iowa) 119 N. W. 714 (1909). But see Kelly v. Richardson, 100 Ala. 584, at page 598, 13 South. 785, at page 791 (1892), where the court adopted the doctrine that "in so far as wills pass real property acquired after [their] execution, the devises are general and not specific unless such after-acquired property is so described as to admit of its identification by the devisees." See Floyd v. Floyd, 29 S. C. 102, 7 S. E. 42 (1888).

In Hensman v. Fryer, L. R. 3 Ch. App. 420 (1867), it was held that pecuniary legatees and the residuary devisee were liable to contribute ratably to the payment of debts; but that case has not been followed in England. Residuary devises are there treated as specific, and pecuniary legacies must be taken for debts before specific devises not charged with the payment of debts. Collins v. Lewis, L. R. 8 Eq. 708 (1869); Tomkins v. Colthurst, L. R. 1 Ch. D. 626 (1875); Farquharson v. Fleyer, 3 Ch. D. 109 (1876).

* The statement of facts is omitted.

declared or is to be necessarily implied from the context of the will, or from the facts and circumstances of the case. The presumption as between the specific devisee and pecuniary legatee is that the testator intends the money legally to be paid first out of the personal property, and next out of the real estate which is included in the residue." 2 Underhill on Wills, 396. This is also the rule in regard to debts. Bapt. University v. Borden, 132 N. C. 476, 44 S. E. 47, 1007.[16]

The appellant, conceding this to be the law, insists that the devise of "all the residue of my lands in Sampson county" is a residuary devise. We do not concur in that view. If the word "residue" stood alone, the construction contended for would be correct; but it is limited by the words "in Sampson county." Item 6 of the will gives to other persons "the balance of my real estate in and around Warsaw in Duplin county." These words, in our opinion, make the devise specific as confined to the lands in "Sampson county"; thus leaving undisposed of any lands the testator may have had in other counties. Whether he had land in other counties does not appear, either from the will or the pleadings. There is nothing in the will to indicate that he knew or believed that his personal estate would not be sufficient to pay the pecuniary legacy, or that he intended his land to be subjected to the payment of them.

Following the well-settled rule that such intention must appear either in express terms or by at least reasonable implication, we cannot charge the legacies upon the land. They must be paid ratably out of the balance in the hands of the executor from the proceeds of the personalty.

Such being his honor's opinion, the judgment must be affirmed.[17]

[16] "The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is that they are payable by the legal personal representatives of the testator (in whom the whole personal estate vests by law) out of the personal estate not specifically bequeathed. The presumption is that the testator intends them to be so paid. Unless charged upon it by the will, they are not payable out of the real estate. The principle of the exemption of personal estate specifically bequeathed is that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or ship, it is manifest that the testator intended the thing to pass unconditionally, and in statu quo, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies. As against creditors, the testator cannot wholly release it from liability for his debts; but, as against all persons taking benefits under his will, he may. The same principle applies to everything which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates, in favor of a particular legatee, from the general mass of his personal estate,—the fund out of which pecuniary legacies are, in the ordinary course, payable." Lord Chancellor Selborne, in Robertson v. Broadbent, L. R. 8 App. Cas. 812, 815 (1883).

[17] In Lediger v. Canfield, 78 App. Div. 596, 79 N. Y. Supp. 758 (1903), the testator's direction that his mother's debts be paid out of "my estate" was held not to charge those debts on his real estate.

GREVILLE v. BROWNE.

(House of Lords, 1859. 7 H. L. C. 689.)

This was an appeal against a decision of the Lord Chancellor and Lord Justice Blackburne, sitting as Commissioners of Appeal, from the judgment of the Encumbered Estates Court.

John Browne, of Galway, had one son, Michael J. Browne, and two daughters, Maria (Lady Ffrench) and the respondent. By his will (which contained many interlineations), dated 20th January, 1825, he bequeathed to his wife an annuity of £100 in addition to what she was entitled to under her marriage settlement, "the same to be in lieu and satisfaction of any dower or thirds she may be entitled to out of my real estates, or any other property I may die possessed of," with the usual power of distress. Then followed a bequest of the household furniture to his wife; then a sum of £1,000 in trust, to give such part of it as she might think fit to his daughter Anne on her marriage with her mother's consent, "to bear no interest till then; the entire (whole) or the remainder of the said sum of £1,000 to go and be considered as part of the residue of any property as hereafter bequeathed to my first object on earth, my best of sons, Michael Joseph Browne. I further bequeath to my dear and very dear daughter Anne Browne, in addition to any part of the above-recited sum of £1,000, a further or additional sum of £5,000, sterling, including the property already settled on her by my marriage articles; and also the value of the property made over for her use before, all payable on her marriage with the consent of her mother, the interest thereof, at five per cent, to be regularly paid till then. But should my said daughter Anne Browne die before her marriage, then my will is that this bequest shall be considered as part of the residue of my property, and go and merge in same." To his daughter Lady Ffrench (to whom he had given as a portion £10,000) and to her husband and children, and to his own sister Julia he left £5 apiece, and concluded thus: "As to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise, I hereby bequeath, devise, give, and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of the same in any manner he may think proper," and he appointed his son his sole executor. By a codicil he appointed John Kirwan his executor in case his son should not wish to act as one of the executors.

The testator died in 1825, and his son having declined to act as executor, the will was proved by Kirwan.

Michael Joseph Browne, the son, entered into possession of the estates, and paid the interest on the legacy of £5,000 to his sister

down to 1842. On the 1st September, 1846, he mortgaged the estates to the appellant and other persons. On the 29th May, 1852, a petition for sale was presented in the Encumbered Estates Court, and an absolute order for sale was made on the 8th September, 1852. On the 4th December, 1855, the estates were sold for a sum of £69,410, a sum not sufficient to pay off the mortgages and interest then due.

On the settling of the final schedule on the 15th December, 1856, Mr. Commissioner Longfield held that the respondent, Anne Browne, was entitled to be paid the legacies bequeathed to her by the will of her father in priority to the mortgagees. The full court confirmed this decision, and on appeal to the Lord Chancellor and Lord Justice Blackburne in the Court of Appeal, it was again affirmed. The present appeal was then brought.

The Lord Chancellor (Lord Campbell.)[18] My Lords, in this case I am of opinion that the decision of Mr. Commissioner Longfield and Mr. Commissioner Hargrave, confirmed by the Lord Chancellor of Ireland and the Lord Justice of Appeal in Ireland, is right; and I think that if your Lordships were to come to a contrary conclusion, you would disturb the well-settled and useful rules of property which have prevailed for a century and a half.

My Lords, the first question is whether these legacies are a charge upon the real estate. If it were res integra, and we had to construe this will by the language employed, without any reference to the construction which has been put upon similar language in other wills, I might allow that there is great force in the very able and ingenious argument we have had from the bar. It might then be contended that the testator had no notion whatever of charging the land with these legacies; but we find that from the time of Lord Macclesfield and Lord Cowper, down to the time of Lord Cottenham and Vice-Chancellor Page Wood, a rule has prevailed upon this subject which has been acted upon uniformly by all judges except Lord Alvanley, a very eminent authority (I do not mean in the slightest degree to disparage him), but with that exception by all the judges that have determined such cases. For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift. That seems to me to be the view which was taken in the cases before Lord Cowper and Lord Macclesfield. The language in which it is expressed varies from time to time, but still that rule seems to have been uniformly acted upon, and I would say, in the language used by

[18] The opinions of Lord Brougham, Lord Cranworth, Lord Wensleydale, and Lord Kingsdown are omitted.

Vice Chancellor Page Wood, in the last case upon the subject, Wheeler v. Howell [3 K. & J. 198], that in the present case "I feel that I should be only introducing a useless and mischievous distinction if I held the legacy not to be a charge, the principle of the decision being in truth the same in the case of legacies as in that of debts."

I therefore conceive it to be unnecessary to travel over and criticise that long series of cases which seems to establish that as a general rule which must be acted upon, that the testator, in using this language in his will, must be supposed to use it according to the sense in which the words have uniformly been construed, and to mean that the legacies should be a charge upon the real estate. Here the testator gives the legacies generally, and then he says: "As to all the rest, residue and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates freehold, leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities or otherwise, I hereby bequeath, devise, give and grant the same to my first object on earth, my son Michael Joseph Browne, in the fullest manner I can." It is quite clear, that here there is first a general gift of legacies, and then there is a disposition of the rest, residue, and remainder of his property, real and personal, of what nature soever, to his son. Therefore, following the rule which has been so long acted upon, these legacies are clearly charged upon the real estate.

Then, my Lords, as to the second point, the discharge. Twenty-one years after the death of the testator, his son mortgaged the land for £50,000; and it is allowed that upon the face of the deed there is no reference whatsoever to those legacies. No part of the legacies was paid; and I presume, that after he had thus charged the land with the legacies, unless there is some special power in the will enabling the son to sell the land discharged from the legacies, it can hardly be supposed that what has taken place can amount to a discharge of the burden that was placed upon the land in respect of the legacies. No authority has been quoted to show that this power exists. Is there, then, here any such special power? I am of opinion that the words that follow what I have read are mere surplusage; they merely express what would otherwise be implied. This testator is fond of a florid style; he deals in superlatives; he is very rhetorical, and he makes use of a great many more words than would be sufficient to accomplish his purpose. He says: "I hereby devise, bequeath, give and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of same in any way he may think proper." We are now considering whether these lands have been discharged of the legacies: We must consider that they are charged with them. Then he, having thus charged the land, did he mean by those words to give his eldest son the power of disposing of the land at any time, so that the younger children would be deprived of the security which he had

before provided for them? I think that no such meaning can be educed from the language he employs, and that therefore this mortgage has not the effect of discharging the land of these legacies. My opinion is, that this appeal should be dismissed, and the decree affirmed.

Orders appealed from affirmed. Appeal dismissed, with costs.[19]

In re BANKS.

BANKS v. BUSBRIDGE.

(Supreme Court of Judicature, Chancery Division. [1905] 1 Ch. 547.)

BUCKLEY, J.* The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses; but the testator may exonerate it, either by express words or by an indication of intention to be found in the will which leads to the court being judicially satisfied that it was the testator's intention to exonerate it. It is not enough that he charges his real estate with the payment of debts. It is necessary to find, not that the real estate is charged, but that the personal estate is discharged. This need not be done by express words, but there must be found in the will plain intention or necessary implication to operate exoneration.† This testator gives his personal estate to Keziah Ann Banks. He specifically devises certain real estate, and, subject to that devise, devises all his real estate to his trustees "subject to the payment of my just debts and funeral and testamentary expenses."

[19] "The court below rightly held that the blending of the real and personal estate in the residuary clause bound the real estate for the payment of the legacies by implication, since 'the residue and remainder' can only be ascertained after the payment of the debts, legacies and expenses. This has been uniformly held in this state." Williams, J., in Sloan's Appeal, Watt's Estate, 168 Pa. 422, 32 Atl. 42 (1895).

"The effect of placing realty with the residue was to subject it to the general rule governing residuary estates." Dubois, J., in Tyler v. Tallman, 29 R. I. 57, 68 Atl. 948 (1908). Also, Simonsen v. Hutchinson, 231 Ill. 508, 83 N. E. 183 (1907). But see Brill v. Wright, 112 N. Y. 129, 19 N. E. 628, 8 Am. St. Rep. 717 (1889); Pearson v. Wartman, 80 Md. 528, 31 Atl. 446 (1895).

"The general rule is that, after certain legacies are given without any express provision of means of payment, a residuary gift blending the real and personal property of the testator creates a charge of the legacies upon the entire estate. * * * A court of equity can not only decree the legacy to be a charge upon the real estate, if the will can be so construed, but with its elastic procedure it can also provide the method of securing the same, and designate the particular real estate which shall in the first instance be reached, because the equitable rights of the present holders may vary." Cornish, J., in Walker v. Follett's Estate, 105 Me. 201, 73 Atl. 1092, 1094 (1909).

"It is established that the rule of Greville v. Browne, 7 H. L. C. 689, applies so as to render legacies payable out of a mixed fund, whether the legacies are given before or after the gift of residue. See Elliott v. Dearsley, 16 Ch. D. 322, 329; In re Grainger, [1900] 2 Ch. 756, 767, [1902] A. C. 1." Swinfen Eady, J., in In re Balls, [1909] 1 Ch. 791, 795.

* The statement of facts is omitted.

† The same thing is true as to charging legacies on land. Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387 (1892).

The argument addressed to me has been, that because the personal estate, that is to say, the whole personal estate, is given to Keziah Ann Banks, I ought to find in that fact an expression of intention that the personal estate shall not bear the debts subject to which the real estate is afterwards devised. I am unable from that fact to find that intention. There is an indication to the contrary at the end of the will—namely, that the testator desires that none of his real estate be sold whilst male descendants of the name of Banks are living. In Brummel v. Prothero (1796) 3 Ves. 111, 114, the Master of the Rolls, Sir Richard Pepper Arden, says: "This" case "is stripped of every circumstance except that of a devise to a trustee for payment of debts and a general bequest of the personal estate to the executor. There is no one case since French v. Chichester (1707) 3 Bro. P. C. 16 (2d Ed.), the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has over and over again been decided that such words are not sufficient to raise such a demonstration as Lord Thurlow says, in Duke of Ancaster v. Mayer, 1 Bro. C. C. 454, is necessary." The personal estate was there held not to be exonerated, and that notwithstanding that there was in that case, not as here a mere charge of debts, but a trust to pay the debts.

The present case differs in the fact that Keziah Ann Banks is not here the executor; but this does not, I think, differentiate the case. A gift to A. is none the less a beneficial gift because A. is also appointed executor. In Haslewood v. Pope (1734) 3 P. Wms. 322, there was a devise of real estate to trustees upon trust to sell so much as would raise money to discharge all the debts the testator should owe at his death, and a gift of all the personal estate to the testator's daughter, whom he made sole executrix. Lord Talbot, L. C., held that the personal estate was not exonerated. I agree that there was a special reason upon which also he founded himself, namely, that the same person was donee of the personal estate and also devisee of the surplus of the real estate in tail. The passage in Mr. Theobald's book on Wills (6th Ed., at the top of page 802) is not, I think, borne out by the cases which he cites. There was in those cases, not, as would seem to be there implied, a mere charge of debts on the real estate (which is the case in the will before me), but a trust to sell the real estate and thereout pay the debts.

There is nothing more here than a devise of the real estate subject to the debts. In my judgment the personal estate is not exonerated, and the real estate is only charged in aid of the personal estate.*

* While a general direction to pay legacies out of a mixed fund of residue charges them ratably on the portions attributable to realty and personalty (In re Spencer Cooper, Poe v. Spencer Cooper, [1908] 1 Ch. 130), the charge implied from blending the residue in one mass has been held in England to leave the legacies payable primarily out of the personalty and to allow the realty to be resorted to only in aid of the personalty if that is insufficient. In re Boards. Knight v. Knight, [1895] 1 Ch. 499.

LACEY v. COLLINS.

(Supreme Court of Iowa, 1907. 134 Iowa, 583, 112 N. W. 101.)

The will of John L. Collins, with a codicil attached, was admitted to probate March 29, 1904, and, in so far as material to this controversy, was in words following:

"First, I desire that all my just debts be paid including my funeral expenses.

"Second. I bequeath and devise to my daughter, Margaret M. Collins (legally adopted by my wife and myself, her former name being Rebecca Crilley), all the remainder of my property of every kind, both personal and real, to have and to hold and do with as may seem best by her, and she shall be my sole legatee.

"Third. I desire, and do hereby nominate and appoint E. R. Lacey as my executor of this my last will and testament, and to give such bond as the court may direct.

"Fourth. I desire that the Independent Order of Odd Fellows of Columbus Junction, Iowa, shall take charge of my remains and direct the funeral services.

"Fifth. I desire that a suitable tombstone to be placed at the grave of myself and wife, not to exceed the sum of one hundred dollars each, and on my monument I desire to have the Emblem of the I. O. O. F. and to be similar to that of R. Caldwell's monument in the Columbus City Cemetery.

"Codicil.

"I, John L. Collins, hereby amend my will heretofore made, by adding this as a codicil, to wit: I give and bequeath my sister Ellen Collins ($1,000.00) one thousand dollars, to be paid her by my executor, and except for this change, I readopt my former will."

E. R. Lacey was duly appointed executor of the estate and in August, 1905, filed his report, and a few days later applied to the court for an order to sell certain real estate to procure funds out of which to pay the legacy of Ellen Collins. To this Margaret M. Collins, objected, on the ground that real estate is not liable, under the terms of the will, for the payment of the legacy. On hearing the sale was ordered as prayed. Margaret M. Collins appeals. Affirmed.

LADD, J. The sole question for determination is whether the legacy to Ellen Collins is payable out of the real estate of deceased. The personal property left by him was inadequate to meet the indebtedness of the estate and pay the funeral expenses. The will speaks as of the date of the testator's death, and the codicil is to be construed as part of it. Looking thereto, the intention of the testator appears to have been: (1) That his debts, including funeral expenses, be paid; (2) that tombstones be erected at the graves of himself and wife at a cost not exceeding $200; (3) that $1,000 be paid by his executor to his

sister, Ellen Collins; and (4) that "all the remainder of my property of every kind, both real and personal," pass to his adopted daughter, Margaret M. Collins. The will recites that "she shall be my sole legatee"; but this was modified by the bequest in the codicil to his sister. It will be observed that the disposition of property is not made in the will in the order above indicated, but as the debts, including funeral expenses, the erection of the monuments and the legacy to the sister are to be paid from the estate, and that left to appellant is designated as "all the remainder of my property of every kind, both real and personal."

The intention that the adopted daughter shall take the residuary estate is manifest. See Kightley v. Kightley, 2 Ves. Jr. 328. No other inference is reasonably to be drawn therefrom. This being so, we have to say whether it was the intention of the testator to charge his entire estate, regardless of its character, with the payment of the legacy to Ellen Collins. The will contains no express provision to this effect, and, unless such intention is to be implied therefrom, the rule must prevail that, even though the personal estate is insufficient, it is not only the primary, but the only fund to which resort may be had for this purpose. Morey v. Morey, 113 Iowa, 152, 84 N. W. 1039; Newsom v. Thornton, 82 Ala. 402, 8 South. 261, 60 Am. Rep. 743; Montgomery v. McElroy, 3 Watts & S. (Pa.) 370, 38 Am. Dec. 771; See In re Will of Newcomb, 98 Iowa, 175, 67 N. W. 587.

But, where such intention is clearly deducible from the language of the will, the realty will be charged with the payment of legacies, notwithstanding the omission to expressly so direct. Morey v. Morey, supra; Greville v. Brown, 7 H. L. 703; Wright v. Page, 10 Wheat. 210, 6 L. Ed. 303; McCampbell v. McCampbell, 5 Litt. (Ky.) 97, 15 Am. Dec. 48; Knotts v. Bailey, 54 Miss. 235, 28 Am. Rep. 348; Thurber v. Battey, 105 Mich. 718, 63 N. W. 995; McQueen v. Lilly, 131 Mo. 9, 31 S. W. 1043; Evans v. Beaumont, 16 Lea (Tenn.) 713; Arnold v. Dean, 61 Tex. 249; Lee v. Lee, 88 Va. 805, 14 S. E. 534; Van Winkle v. Van Houten, 3 N. J. Eq. 172. And where the legacies are pecuniary and general, and there is a gift of the residue of the estate, both real and personal, and this is blended as one mass, the rule prevails that this conclusively manifests an intention to charge the entire residuary estate, both real and personal, therewith. Pitkin v. Peet, 87 Iowa, 268, 54 N. W. 215; Sloan's Appeal, 168 Pa. 422, 32 Atl. 42, 47 Am. St. Rep. 889; Brill v. Wright, 8 Am. St. Rep. 723, 112 N. Y. 129, 19 N. E. 628; Knotts v. Bailey, supra; Newsom v. Thornton, supra; Lewis v. Darling, 16 How. 1, 14 L. Ed. 819. See numerous decisions collected in 19 Am. & Eng. Ency. of Law (2d Ed.) 1354 et seq.; Lee v. Lee, 88 Va. 805, 14 S. E. 534.

In the last case, sometimes cited as holding that the rule is different where the bequest is by codicil, the latter provides for payment "out of any money due and belonging to my estate," and this was construed to point out the fund from which the legacy was to be taken. The ba-

sis of the rule is that a mixed fund has been created out of which to pay the legacies. Tidd v. Lister, 3 De G., M. & G. 857; Ellis v. Bartrum, 25 Beav. 110. It is not necessary that words of like import and equivalent in meaning, as in this case, be employed. In re Hawden (1904) 1 Ch. 693; Hart v. Williams, 77 N. C. 426.

Guided by these well-established principles, the district court rightly held that the legacy to Ellen Collins was payable out of the realty, and its order directing the sale is approved. Affirmed.[20]

MOORE v. ALDEN et al.

(Supreme Judicial Court of Maine, 1888. 80 Me. 301, 14 Atl. 199, 6 Am. St. Rep. 203.)

PETERS, C. J.[21] Horatio E. Alden, whose will is presented to be construed by the court, after directing that certain necessary bills be paid, and giving his wife certain property outright, also gives to her an annuity of $1,000 for her life-time, the annuity to be paid from the earnings of his individual and partnership properties; and he declares that these gifts to his wife are to be in lieu of all allowances, dower, and distributive share to which she might be entitled out of his estate. He then grants other annuities, their payment made subject to a prior payment of his wife's annuity, and makes sundry bequests to take effect on the death of his wife. It appears that he died seized of dowable real estate; that no child was left by him; that the widow is now 39 years old; and that the entire estate reduced to money, now in the hands of the trustee, the administration accounts having been finally settled, amounts to $11,707.61.

It is evident enough that the annuity to the widow, to say nothing of the other annuities, cannot be obtained from the income and earnings of the estate. And the question of the case is whether she is entitled to receive the amount each year, although it will be necessary to entrench upon the corpus of the estate to supply the deficiency. She correctly claims that the full annuity should be paid to her as long as the estate lasts, upon the rule, which appears to be well established in the law, that, where a testamentary gift is made by husband to wife, in satisfaction of her waiver of dower in his estate, the gift has a preference over all other unpreferred legacies, and for the reason that the estate receives a valuable consideration for such gift. The principle is based upon the idea of contract between husband and wife. He dictates the terms, and she accepts them. The estate gets

[20] But see Lee v. Lee, 88 Va. 805, 14 S. E. 534 (1892), where, also, the legacy was given in a codicil. That case does not, however, purport to deny the doctrine of Greville v. Browne, ante, p. 673.

[21] The statement of facts and the part of the opinion relating to costs are omitted.

her right of dower, and she receives the gift in the will in lieu of dower.

This is an old doctrine, originating with Lord Cowper in Burridge v. Bradyl, 1 P. Wms. 127, adopted by Lord Hardwicke in Blower v. Morret, 2 Ves. Sr. 422, which has so extensively prevailed as never to have been dissented from, that we discover, either in the English or American cases. Its application was resisted by counsel in an early case (Davenhill v. Fletcher, Amb. 244), where the gift to the wife greatly exceeded in amount the value of the dower, the argument being placed on the great inadequacy of consideration; but the point was overruled, the answer to it being that the testator is the only and best judge of the price at which he is desirous to become the purchaser of the wife's right. Rop. Leg. *432.

The rule does not, however, apply, if the wife has no right of dower. Her right must be subsisting at the death of the testator. Otherwise she is not a purchaser. In such case she pays no consideration. Id. And the general rule does not prevail if the will clearly discloses that the testator intended that the gifts to his wife should not have a preference over other bequests. The burden will be on the executor to show, from the terms of the will, that a preference is forbidden. The presumption favors the widow's claim. The intention of the testator, as found in the will, is a part of the contract made with the widow, and, if she accepts the provisions of the will, she does so voluntarily, and abides the consequences.

The internal evidence of the will, in the present instance, does not repel, but favors, the widow's contention. It discloses that the testator, having no child, had great affection for his wife, providing in different ways in his bequests for her protection. The evidence is conclusive that he believed his estate would easily bear all the burdens placed by him upon it. He must have assumed that the annuity to his wife would be needed by her, to sustain the equipments of housekeeping given her, including the support of horses and carriages provided for her use. He makes the payment of his wife's annuity a prior claim to all other bequests. The very relation of husband and wife creates a strong presumption in her behalf, when we consider that, after the bounties to her are paid, distant relatives, if not strangers, are provided for.

We think that the will, as a whole, though not by express terms, by implication, indicates preference in the devises and bequests to the wife, and struggles to utter it. There is a clause in the will which, if standing alone, might seem to look in a contrary direction, and that is the declaration of the testator that the annuity is to be paid from the earnings of his individual and partnership property. We think the idea of the testator in this clause was that he was enlarging, rather than limiting, the funds out of which the annuity might be paid. He devotes for the purpose the earnings of all his properties. He expresses no limitation or condition. The gift is unconditional and ab-

solute, although, as is often the case, he overestimates the sources of supply which were to assure its payment. The sources indicated turning out to be insufficient, others must be taken to supply the deficiency. It is a demonstrative legacy, not lost because of the nonexistence of the property specially pointed out as a means of satisfying it.

A case very like this strongly sustains this conclusion. Smith v. Fellows, 131 Mass. 20. The following additional references may be profitably consulted upon the general questions of the case: Heath v. Dendy, 1 Russ. 543; Wells v. Borwick, 17 Ch. Div. 798; Potter v. Brown, 11 R. I. 232; McLean v. Robertson, 126 Mass. 537; 3 Rom. Eq. Jur. § 1142, note, and cases; Schouler, Ex'rs, § 490, and cases in note. * * *

Bill sustained.[22]

SECTION 3.—THE RETAINER AND REFUNDING OF LEGACIES AND DISTRIBUTIVE SHARES

ANONYMOUS.

(High Court of Chancery, 1718. 1 P. Williams, 495.)

In this case (int. al.) it was said by Sir Joseph Jekyll, Master of the Rolls, that as all legatees are on a deficiency of assets to be paid in proportion, so if the executor pays one of the legatees, yet the rest

[22] See In re Wedmore [1907] 2 Ch. 277; In re Woodbury's Estate, 40 Misc. Rep. 143, 81 N. Y. Supp. 503 (1903). Compare In re Brown, 42 Misc. Rep. 444, 87 N. Y. Supp. 247 (1904). In In re Woodbury's Estate, supra, the court said: "The law is well settled that where a legacy is given in consideration of the relinquishment by the legatee of some subsisting right or interest—as to a creditor in satisfaction of a debt or to a wife in lieu of dower—such legacy is entitled to priority over general legacies, which are mere bounties, for in such cases the legatee stands in the situation of a purchaser and not a mere volunteer. Such is the rule, though the value of the legacy greatly exceeds the value of the rights relinquished."

In Farnam v. Bascom, 122 Mass. 282 (1877), the testatrix left no residue and insufficient property to pay the debts and satisfy the specific legacies and devises. It was held that the specific legacies and devises must be charged with the debts in proportion to their respective values, with the sole exception that testatrix's husband, by assenting to the will and relinquishing his right to one-half of the personal property, became a purchaser of the devise of a life estate to him; hence that life estate could be resorted to only after the other devises and the legacies were exhausted. But under the California statute land devised in satisfaction of a debt less in amount than the value of the devise must contribute to the payment of debts the same as other devised lands. In re Thayer's Estate, 142 Cal. 453, 76 Pac. 41 (1904). See, also, Matthews v. Targarona, 104 Md. 442, 65 Atl. 60 (1906). On contribution by legatees and devisees to make up a loss to some of their number caused by the widow electing to take her distributive share, see McGuire v. Luckey, 129 Iowa, 559, 105 N. W. 1004 (1906); Lewis v. Sedgwick, 223 Ill. 213, 79 N. E. 14 (1906); Kincaid v. Moore, 233 Ill. 584, 84 N. E. 633 (1908). On the effect of the death of the widow during the period of the right of election between dower and legacy in lieu of dower, see 2 L. R. A. (N. S.) 959, note.

shall make him refund in proportion; nay, if one of the legatees gets a decree for his legacy, and is paid, and afterwards a deficiency happens, the legatee who recovered shall refund notwithstanding, in imitation of the spiritual court where a legatee recovering his legacy is made to give security to refund in proportion if, etc.

But if the executor had at first enough to pay all the legacies, and afterwards by his wasting the assets occasions a deficiency, in such case the legatee who has recovered his legacy shall not be compelled to refund, but shall retain the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time; before the wasting by the executor; whereas if the other legatees had commenced their suit before such waste committed, they might have met with the like success, et vigilantibus non dormientibus jura subveniunt.

This case I put to Mr. Vernon, who was of the same opinion.[23]

[23] "There is a distinction, running through the cases, between an original deficiency of assets, and where the assets were sufficient, but had been wasted by the executor. In the former case, a legatee, who has been paid more than his proportion, under the deficiency, must refund; but in the latter case, he is not obliged to, for he has received no more than what was due to him, and the other legatees must look to the executor. The legatee, who has been paid, shall retain the advantage of his legal diligence. This rule was so laid down by Sir Joseph Jekyll, in 1 P. Wms. 495 (Anon.); but it does not apply where a creditor, instead of a legatee, is in question. On a waste by the executor a legatee who has been paid, must refund in behalf of a creditor. Eyre, Chief Baron, in Hardwicke v. Mynd, 1 Anst. 112; Anon., 1 Vers. 162. But the authorities stop here; and the case of Walcott v. Hall, 2 Bro. 305, is such a clear and solemn adjudication on this point as to place it beyond all further controversy. There was a legacy, in that case, of £50 given to the plaintiff and payable at the age of 21, and the interest, in the meantime, to be applied to his maintenance. The residue of the personal estate was given to the defendants. The executor retained the legacy for the plaintiff, and paid over the residue to the residuary legatees, and then became a bankrupt. On a bill filed against the executor and the residuary legatees, Lord Kenyon, who was then Master of the Rolls, declared that the residuary legatees were not liable for they had received no more than they were entitled to, and the party must rest on the devastavit, and he dismissed the bill." Chancellor Kent, in Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614, 626, 627 (1817).

That even the residuary legatee need not refund when he has been paid out of a sufficiency of assets and there is a subsequent devastavit by the executor, see, also, Peterson v. Peterson, L. R. 3 Eq. 111 (1866); In re Lepine, [1892] 1 Ch. 210; Demere v. Scranton, 8 Ga. 43 (1850). But in Buffalo Trust Co. v. Leonard, 154 N. Y. 141, 145–147, 47 N. E. 966, 967 (1897), Gray, J., for the court said that if the residuary legatee, without having the estate settled up and the residue judicially ascertained, chose to demand and receive moneys from the executor, "he took them with all the risks attending such premature payment"; that while, as between general or specific legatees, the rule stated in the anonymous case, supra, was correct "where the case is between a general legatee and the residuary legatee, I can imagine of no defense to the latter's liability to refund in case of a premature payment of moneys, where the former is without fault in the matter, and I certainly know of no rule which would impute to an infant legatee the fault of his guardian. The residuary legatee is entitled to nothing until all the debts and other legacies are paid." Although the executor received into his possession moneys to an amount more than sufficient to pay the specific legacies and to leave a surplus greater than was in fact received by Leonard, the residuary legatee (154 N. Y. 143, 47 N. E. 966), although the executor was found to have been financially responsible from the time of his appointment up to about the time he absconded (154 N. Y. 144, 47 N. E. 966), and although the decision in Wal-

DAVIS v. NEWMAN.

(Supreme Court of Appeals of Virginia, 1844. 2 Rob. 664, 40 Am. Dec. 764.)

ALLEN, J.[24] The testator, after making large specific bequests, directed the residue of his estate to be divided into six parts, of which the executor was to have one, and the remaining five were divided among his children and grandchildren. He owed no debts, and the executor proceeded to make sundry payments to the five legatees. The payments were voluntary; but, as it is alleged, were made under a mistake of fact as to the value of the assets. When the money was paid, all parties supposed that a bond given by Thomas Macon to the testator in his lifetime for a large amount, was good and would be collected; and the executor, in settling with the legatees, acted under that impression. The bond has turned out to be unavailing. Macon, though in the possession of an immense estate at the testator's death, was in truth greatly embarrassed, and subsequently gave deeds of trust which exhausted all his property. There being no creditors of the testator the executor now seeks to recover back for his own benefit the sums overpaid to the legatees.

In 1 Roper on Legacies, 315, it is said to be a rule in equity, to presume, when an executor voluntarily pays one or more legacies, that he has received sufficient assets to discharge the rest; and although the fact be otherwise, not to admit evidence to that effect. In such cases, therefore, the executor will be under the necessity to make up the deficiency with his own money, since he will not be permitted to institute proceedings (except in particular instances) against the legatees so paid, to oblige them to refund. See, also, 2 Lomax's Digest, 173; 2 Williams on Ex'rs, 892; 1 Eq. Ca. Abr. 239. The cases referred to by Roper of Noel v. Robinson, 1 Vern. 94, Newman v. Barton, 2 Vern. 205, Coppin v. Coppin, 2 P. Wms. 292, and Orr v. Kaines, 2 Ves. Sr. 194, seem to me fully to sustain the position that in England, where the executor has made a voluntary payment, he cannot compel the legatee to refund: though there may be good reason to doubt whether they fully justify the position that such payment is an admission of assets sufficient to pay all the rest of the legatees, and that, though the fact may be otherwise, equity will not admit evidence to that effect. The authority for this proposition is the opinion of Sir John Strange, Master of the Rolls, in 2 Ves. Sr. 194. That opinion has been reviewed by President Tucker in Gallego's Ex'rs v. Attorney General, 3 Leigh, 488,

cott v. Hall, supra, was approved (154 N. Y. 146, 47 N. E. 967), the last paragraph of the opinion asserted that "in the present case, for the defendant Leonard, in the absence of a judicial settlement of the accounts of the executor, to have received a voluntary payment of moneys, was to subject himself to the same liability to refund as would exist if it was shown that he received the money with knowledge that the other legacies had not been paid or provided for." 154 N. Y. 147, 47 N. E. 967.

[24] Part only of the opinion is given.

24 Am. Dec. 650, and he there shows, that Sir John Strange merely says such payment furnishes a presumption of the sufficiency of assets to pay the rest of the legacies, but does not say the presumption is conclusive. In the opinion of President Tucker, such presumptions, like all others, are liable to be rebutted, and although an executor may have been willing to encounter the hazard of paying one, it furnishes no reason for being compelled to pay the rest out of his own pocket.

I should not consider such a payment to one as conclusively establishing the executor's liability to all the rest, although the assets were deficient originally; because that would conflict with the spirit of our laws and adjudications. In England, the executor is personally bound if he fails to plead. A judgment against him on any plea except plene administravit, or a plea admitting assets to a sum certain and riens ultra, is conclusive on him that he has assets to satisfy such judgment. Our statute (1 R. C. p. 384, c. 104, § 36) has altered the law in this respect, and a failure to plead, or mispleading, subjects him to no personal responsibility. To hold that a voluntary payment to one legatee is an implied admission of assets sufficient to pay all, would be giving to such implied admission in pais an effect to which the statute has declared an admission on record shall not be entitled. For, by any other than the plea of plene administravit, he was held to admit assets. 1 Wms. Saund. 335, note 10.

But as between the executor and the legatee who has been paid, the cases are decisive that he shall not recover back the payment if voluntarily made. And no case has been cited which shews that such a bill has ever been sustained in England. It is certainly not shewn by those cited from 1 P. Wms. 495, and 2 P. Wms. 447. In Virginia the question has never arisen. Burnley v. Lambert, 1 Wash. 308, was a suit by the legatee to recover slaves bequeathed to him, and which had been seized and sold on an execution against the executor after he had assented to the legacy. Judge Pendleton, after deciding that the assent of the executor to the legacy vested the legal title in the legatee, which could not be divested at law by the creditor, remarks that the creditor is not without remedy; he may follow the assets in the hands of the legatee, or proceed against the executors, in which case the executors have their remedy in equity to compel the legatee to refund. It does not appear from the report, whether the debt was one of which the executor had no previous notice; and it was unnecessary for the court to enquire into that matter. If it was a debt of which he had no notice before paying away the assets to legatees, he had a right to compel the legatees to refund. Nelthrop v. Biscoe, 1 Ch. Cas. 135. And as the assets are always bound to the creditor, and he may pursue them in the hands of the legatee even though the testator's effects would have been sufficient to pay both debts and legacies (1 Vern. 162), there might be good reason for holding that where the executor paid a legacy with notice of a debt, believing the assets to be sufficient, and they proved insufficient to pay both, he should be permitted to compel the

legatee to refund. The legatee takes subject to the liability of being compelled to refund at the suit of a creditor. And where the executor has not been culpable, and is compelled to pay the debt, it seems to me he should be substituted to the rights of the creditor he has paid. So far the strict rule of the English courts might properly be relaxed in conformity with the more liberal spirit of our legislation in regard to executors, and with the principles which led the court to give relief in Miller's Ex'rs v. Rice, 1 Rand. 438.

Jones v. Williams, 2 Call, 102, was a controversy about accounts, and the question could not have arisen; for the money advanced to the distributee was advanced as a loan, to be returned if on a settlement he was not entitled to it; and for that reason the executor was allowed interest on the sum decreed to him.

Bowers' Ex'r v. Glendening, 4 Munf. 219, decides merely that an executor against whom a creditor obtains a decree may compel the legatee to refund.

In Gallego's Ex'rs v. Attorney General, 3 Leigh, 450, 24 Am. Dec. 650, it was decided that where the estate proved deficient by an unexpected depreciation of the property after some of the legatees were fully paid, the unpaid legatees have a right to look to the executors for their ratable proportions of the fund, and are not bound to have recourse to the legatees who were fully paid to compel them to refund. In England, the unsatisfied legatee cannot maintain a suit against the legatee fully paid to compel him to refund, if the executor is solvent. Such Judge Tucker lays down to be the rule; and therefore, though he was of opinion in Gallego's Ex'rs v. Attorney General that the executors were liable only for the ratable proportion of the legacy, and not for the whole, upon the ground that payment in full to one was an admission of assets sufficient to pay all, he still held, that as the executors were quite solvent, the legatees had no right to call upon those paid to refund. The case did not call for a decision on this point, and the other judges did not notice it. If, as I conceive, the executor who has been made liable at the suit of the creditor can only be permitted to compel the legatee, whom he has voluntarily paid, to refund, by substituting him to the rights of the creditor, who could have proceeded in the first instance against the assets; where it is shewn that no such original right to charge the assets exists, there is no right to which the executor can be substituted.

But even if, in a case where there was an original deficiency of assets (as in Gallego's Ex'rs v. Attorney General), it should be held that the executor, having through mistake paid one legatee in full, and having afterwards been compelled to pay the proportions of the others out of his own pocket, might compel the legatee overpaid to refund; the case would still fall short of that under consideration. Here the executor has not been called upon by a creditor to make good assets improperly paid away, or by an unpaid legatee to pay him a ratable proportion of his legacy out of his own pocket: he is seeking to recover

for his own benefit alone. To sustain his claim to such a recovery would be against the whole series of authorities in England, commencing at an early period, and without the support of a single authority or dictum in our own courts.

It is the duty of the executor to make himself acquainted with the condition of the estate. The means are in his own hands, and if he neglects to avail himself of them it is his own fault. He is not compelled to pay the legatees until the debts are discharged, and until he has ascertained the precise extent of the assets. He can decline paying except under the decree of a court, and then he is entitled to call upon the legatee to refund if the estate was originally deficient; and he may with us always require a refunding bond. If, without using any of these precautions, he voluntarily pays the legatee, the latter has a right to consider the money as his own; subject, it is true, to be called upon to refund at the suit of creditors, or of an unpaid legatee if the assets were originally deficient. But these are contingencies too remote in his apprehension, when a payment has been made to him under such circumstances, to have any influence on his conduct. The hardship of the case is greater upon the legatee than the executor. He has been in no default. No duty was imposed upon him to examine into the state and condition of the assets. He receives what a payment under such circumstances has impressed him with a conviction he will never be called upon to refund. Such unexpected additions to men's fortunes are frequently spent without much consideration; wasted in the gratification of some want to which the legacy has given birth, or released to some more needy relative. It would be the grossest injustice, under such circumstances, to permit the executor, who had thus misled him by his negligence or inattention to his duties, to compel him at some distant day to refund the money. The case of a legatee, and as between him and the executor, seems to me much stronger than the cases of Brisbane v. Dacres, 5 Taunt. 144, 1 Eng. C. L. Rep. 43, and Skyring v. Greenwood, 4 Barn. & Cress. 281, 10 Eng. C. L. Rep. 335, in the first of which cases Gibbs, J., remarked, that he who receives money so paid "has a right to consider it as his without dispute; he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money."

The only modifications of the general rule which our laws seem to call for are those already indicated. A payment to one in full shall not be construed into an admission of assets sufficient to pay all. It merely furnishes a strong presumption, which may be rebutted by proof of an original deficiency. And in all cases where the executor is compelled to pay a creditor, he shall, upon the principle of substitution, have the right to compel the legatee to refund, and this although he had notice of the debt at the time of payment, unless he has been guilty of culpable neglect of his duty to inform himself of the condi-

tion of the estate. But where he has not been subjected to liability at the suit of a creditor, he shall not be permitted to recover back, for his own benefit, what he has voluntarily paid to the legatee. * * *

Upon the whole * * * it seems to me that both the rules of law and the particular circumstances of this case should preclude his recovery.[25]

[25] "In England, it seems to be settled by the authorities, a legatee is not bound to refund at the suit of the executor, unless the payment by him was compulsory, or unless the deficiency was created by debts, which did not appear until after the payment of the legacy, in either of which cases the executor might compel the legatee to refund the excess paid on the legacy. See Toll. Ex'rs, 341; 2 Fonbl. Eq. 376; Coppin v. Coppin, 2 P. Wms. 296; Orr v. Kaines, 2 Ves. Sr. 194. But the general spirit of the decisions in Virginia and West Virginia has relaxed much of the severity of the ancient English cases, when no fraud or misconduct is imputed to the executor. See Jones' Ex'r v. Williams, 2 Call, 103, top page 86; Burnley v. Lambert, 1 Wash. (Va.) 312; Gallegoe's Ex'rs v. Lambert (Tucker's opinion) 3 Leigh, 465 [24 Am. Dec. 650]. I am therefore of the opinion that there is no inflexible rule, which refuses to an executor under any circumstances the right to recover back from a legatee an excess of advancements which may have been made to him, even when the deficiency was created by debts which appeared before the payment of the legacy, and the payment was voluntary; but in such case the executor will have to make a very strong case to rebut the almost conclusive presumption that he had a sufficiency of assets to justify the payment of the legacy, which arises from the mere fact that he has paid the legacy. As an instance, where the law would permit an executor to recover, I may put the case where the assets were apparently abundant when the legacy was paid, but were subsequently rendered deficient by a general and destructive fire. See Miller v. Rice, 1 Rand. (Va.) 438. The general rule is, as laid down in English cases quoted [cited] above, and, to justify a departure from this general rule, the executor must show that in the execution of the will he has done everything which a prudent man ought to have done, and has done nothing that a cautious man ought not to have done; and it will not suffice to show that he has been guilty of no fraud but has acted bona fide and with honest intentions. That the English rule has not been relaxed in Virginia or West Virginia beyond what is above stated, abundantly appears from the cases of Davis v. Newman, 2 Rob. (Va.) 664 [40 Am. Dec. 764], Nelson's Ex'r v. Page, 7 Grat. (Va.) 160, Anderson v. Piercy, 20 W. Va. 282, and Shriver v. Garrison, 30 W. Va. 456, 4 S. E. 660." Green, J., in McEndree v. Morgan, 31 W. Va. 521, 531, 532, 8 S. E. 285, 291 (1888).

"The claim that the executor makes of an alleged overpayment by him to a legatee is a matter, so far as a recovery thereof by the executor is concerned, between him and such legatee. In his accounting the executor charges himself with all the assets of the estate which he has received, and credits himself with the payment of such items as he thinks are or are not proper charges against the estate; and unless the estate were liable to pay any particular item, it should not be allowed, notwithstanding the payment had been made by the executor. * * * An overpayment by the executor to any person entitled to a distributive share does not in any way diminish the amount of the estate which the law says is in the executor's hands for distribution. The law does not recognize any such overpayment, and does not, therefore, permit the executor to credit himself with the amount of the excess. In legal contemplation the sum is in the hands of the executor as assets of the estate which he must pay over to the parties entitled thereto." Peckham, J., in Matter of Underhill, 117 N. Y. 471, 474, 475, 22 N. E. 1120, 1121 (1889). See, also, Matter of Robertson, 51 App. Div. 117, 64 N. Y. Supp. 385 (1900).

BUCHANAN v. PUE.

(Court of Appeals of Maryland, 1847. 6 Gill, 112.)

MARTIN, J.[26] This is an appeal from a decree of the chancellor, of the 1st June, 1846, by which it was ordered that the specific legacy, which had been delivered to the defendant by the complainant, should be returned to the complainant, to be applied by him as the executor of Edward Buchanan, in satisfaction of the testator's debts. * * *

With respect to the second point made by the counsel for the appellant, we are of opinion there is no circumstance in this case which precludes the appellee from reclaiming this legacy in a court of equity.

It has not been pretended that the insufficiency of the assets to satisfy the debts of the testator has been caused by the fraud or misconduct of the executor. The fund created by the sale of the farm in Baltimore county has been faithfully applied to the purposes designated by the will of Edward Buchanan; and after having been exhausted in the payment of his debts, there still remains outstanding debts amounting to the sum of nineteen hundred dollars, in addition to the sum of three hundred and forty-five dollars and thirty-eight cents, due to the executor for disbursements made, and debts paid by him, on account of the estate. And, we think, that as it is evident in this case that the legacy was delivered by the appellee to the appellant upon the entire confidence, sincerely entertained, that the assets would be sufficient for the payments of the debts of the testator, but have proved to be inadequate, without the fault of the appellee, he was entitled to coerce a return of it, through the instrumentality of a court of equity. Upon this subject, there appears to have been some contrariety of opinion in the early cases, but the principle we have announced will be found to be sustained by the weight of authority, both in England and in this country.

In the case of Davis v. Davis, reported in 8 Viner Abrgt. 423, it was held:

"That an executor may institute a suit against a legatee, to refund a legacy voluntarily paid, as well as a creditor; and for this reason, an executor, paying a debt of the testator out of his own pocket, stands in the creditor's place, and has the same equity against the legatee to compel him to refund."

In Hawkins v. Day, decided in 1753, Ambler's Rep. 160, Lord Hardwicke said:

"The rule in this court, to grant prohibitions in case legatees sue in the spiritual courts, and refuse to give security, is out of use; but the court will decree a legatee to refund."

In Edwards v. Freeman, 2 P. Wms. 446, Lord Chief Justice Raymond declared:

[26] The statement of facts is omitted, and part only of the opinion is given.

"That if an executor pays a legacy on supposition that there are assets to pay all the other legacies, and there happens a deficiency, the court will make the legatee, who is paid his full legacy, refund."

The principle thus announced in the cases to which we have referred was recognized by Lord Alvanley, in the case of Johnson v. Johnson, 3 Bos. & Pul. 169, by Chief Justice Marshall, in Riddle v. Mandeville, 5 Cranch, 330, 3 L. Ed. 114, and has been directly adjudicated by the Supreme Court of New Jersey, in the case of Harris v. White, 5 N. J. Law, 425, and by the presiding judge of the Court of Appeals of Virginia, in Gallego's Ex'rs v. Attorney General, 3 Leigh, 489, 24 Am. Dec. 650. And Judge Story, when treating of this subject in the first volume of his Equity Jurisprudence (section 90), says:

"In the course of the administration of estates, executors and administrators may often pay debts and legacies upon the entire confidence, that the assets are sufficient for all purposes. It may turn out from unexpected circumstances, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances, they may be entitled to no relief at law. But in a court of equity, if they have acted with good faith, and with due caution, they will be clearly entitled to it, upon the ground that they will be otherwise innocently subject to an unjust loss, from what the law itself deems an accident."

The same doctrine is maintained in Walker v. Hill, 17 Mass. 385.

* * *

We place the right of the appellee to maintain this suit, upon the plain and acknowledged principle "that the payment of the legacy was made on a mistaken ground, with respect to the facts of the case, and that therefore it would be unjust and inequitable in the legatee to withhold it." Hutchins v. Hope, 12 Gill & J. (Md.) 256. * * *

Decree affirmed.[27]

[27] See Sellers v. Smith, 11 Ala. 264 (1847); Clifton v. Clifton, 54 Fla. 535, 45 South. 458 (1907). Where persons entitled to a distributive share of an intestate's estate are known to exist, but through error of law the administrator distributes the whole estate to others, or where through error of law the personal representative pays to some one not entitled to take, the personal representative can recover the money mistakenly paid only if in the given jurisdiction money paid with full knowledge of the facts, but under mistake of law, may be recovered. Recovery was denied in Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753 (1898); Shriver v. Garrison, 30 W. Va. 456, 4 S. E. 660 (1887), and Scott v. Ford, 75 Or. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469 (1905). Compare Rogers v. Ingham, 3 Ch. D. 351 (1876). Recovery was allowed in Culbreath v. Culbreath, 7 Ga. 64, 50 Am. Dec. 375 (1849). See, also, Northrop v. Graves, 19 Conn. 548, 50 Am. Dec. 264 (1849). Even where recovery may be had for mistake of law alone the defendant's innocent change of position may be a defense. Brooking v. Farmers' Bank, 83 Ky. 431 (1885). And where recovery may not be had because the mistake is one of law only, the mistaken payment may be applied in extinguishment or reduction of a debt or liability actually due and owing. Hemphill v. Moody, 64 Ala. 468 (1879). In Williams v. McCardell, 14 S. C. 219 (1880), a distributee, who had been paid by the administrator out of the personal estate more than his total share of the real and personal estate of the intestate amounted to, died, and the other distributees sought on parti-

CLARK v. WILLIAMS.

(Supreme Court of North Carolina, 1874. 70 N. C. 679.)

READE, J.[28] The plaintiff, who was one of two sureties to the administration bond, and paid one-half of a debt recovered against the insolvent administrator, is not subrogated to the rights of the creditor, whose debt he paid, but to the rights of the administrator, for whom he paid it. It follows, that if the administrator had no rights, the plaintiff, his surety, has none. It becomes important, therefore, to determine the rights of the administrator.

The administrator delivered over the property of the estate to the distributees, leaving a debt against the estate unpaid, and which was subsequently recovered against him. Can he recover back of the distributees? It is settled that he cannot. Donnell v. Cooke, 63 N. C. 227. To this general rule there is the exception that, if he can show special circumstances to rebut the idea of negligence, he may recover back. Id. The special circumstance relied on in this case is that the intestate was not principal in the debt against the estate, but was only the surety; and the principal was, beyond all question, solvent, and able to pay, and was rendered insolvent by the unforeseen accident of the emancipation of his slaves so that it would have been overscrupulousness, if not downright wrong, for the administrator to hold the estate in his hands to pay a surety debt, which there seemed to be not the slightest probability that he would have to pay.

tion to appropriate, to the exclusion of his creditors, his interest in the inherited real estate. In was held, however, that the claim for repayment of the excess which he received from the ancestor's estate had no priority over his other debts, even with respect to the property inherited from the ancestor. Compare 4 L. R. A. (N. S.) 189, note.

"It is well settled that a legatee, who has received no more than his legal share of the estate, is not liable to account to another legatee, who by reason of a devastavit of the executor fails to receive his full share. His remedy is against the executor. The one who receives but what belonged to him has done the other no wrong. There is a line of cases which hold that if, by mistake as to the condition of the estate, the executor pay to one legatee more than his share, or if by some unforeseen cause, for which the executor is not responsible and could not have reasonably anticipated, it turns out upon a final settlement that he has overpaid some of the legatees, he, after making good to the other legatees their share, may have relief in equity against the overpaid legatees. But the court will grant such relief only when it clearly appears that the executor was unable to foresee the 'peculiar circumstances' by reason of which the mistake occurred. Alexander v. Fox, 55 N. C. 106 [62 Am. Dec. 211]; Lambert v. Hobson, 56 N. C. 424. It may be that, if the executor is insolvent, and the legatee has suffered loss under circumstances which would have entitled the executor to relief in equity, such legatee would be subrogated to the rights of the executor. No such condition is shown here, for the reason that there were ample resources of the estate from which equality could have been secured, and that, with the concurrence of the plaintiffs, they have been distributed." Conner, J., in Sprinkle v. Holton, 146 N. C. 258, 264, 265, 59 S. E. 680, 682 (1907). On the refunding of legacies, see 4 Prob. Rep. Ann. 422, note.

[28] The statement of facts is omitted, and part only of the opinion is given.

The administrator, under these circumstances, being entitled to recover back of the distributees, and the plaintiff surety being substituted in his place, the question is: In what proportion must the distributees contribute? If they had executed the usual refunding bonds with sureties, they would have been conditioned, that each distributee should contribute his "ratable part." It was the privilege of the administrator to require such bonds. As he did not do so, their liability to him is each for his ratable part only. And the solvent ones are not liable to pay the parts of the insolvent.

The judgment below must be modified, so as to give the plaintiff judgment here against Williams for one-half of his claim, and judgment against each of the other defendants for one-eight of the other half. * * *

PER CURIAM. Judgment modified.[29]

ZOLLICKOFFER v. SETH.

(Court of Appeals of Maryland, 1876. 44 Md. 359.)

ALVEY, J.[30] The questions in this case arise upon a demurrer to the complainant's bill, and by the demurrer the facts alleged are admitted to be true. If, therefore, the bill discloses a case to entitle the complainant to relief, the decree appealed from must be reversed, and the cause remanded for further proceedings in the court below.

The right of the complainant to recover from the defendants, or any of them, will depend upon the decision of the two following propositions:

(1) Whether, by reason of the death of McHenry Grafton, and the full administration of his estate by his personal representative, his obligation upon the administration bond of Alexander H. Seth and John M. Frazier, in which Coates and Grafton were co-sureties, ceased and became extinguished, not only as against his personal representative, but also as against his legatees and distributees, who have received his personal estate upon final administration by the executor.

(2) The complainant, as executor of Coates, having paid the legacies under Robert Seth's will, after the administration and distribution of the personal estate of McHenry Grafton, Whether he, the complainant, is entitled to relief for contribution as against the legatees or distributees of the estate of Grafton, in respect to the distributions made to them under the will of their testator?

1. The administration bond, upon which Coates and Grafton were co-sureties, was given in 1865. Alexander H. Seth, the surviving administrator, with the will annexed, of Robert Seth, is and has been for

[29] But see McClung v. Sieg, 54 W. Va. 467, 480, 46 S. E. 210, 66 L. R. A. 884 (1903). See, also, Cutright v. Stanford, 81 Ill. 240 (1876).

[30] The statement of facts is omitted, and part only of the opinion is given.

a long time past utterly insolvent; and John M. Frazier, the other administrator and principal in the bond, died in 1870, also insolvent, and before the estate of Robert Seth was fully administered. Grafton, the co-surety with Coates, died in April, 1867, leaving considerable estate, and by his will disposed of his property to his mother and brothers and sisters, and appointed John M. Frazier and Thomas L. Hall his executors. Coates died in September, 1871, leaving a will wherein the complainant was made executor.

In October, 1870, Hall, the surviving administrator of Grafton, settled in the orphans' court his second and final account, showing that the personal estate of the testator had been fully administered, and thereupon passed over the property to the parties entitled to receive it under the will of the deceased.

In October, 1873, Alexander H. Seth, as surviving administrator of Robert Seth, passed an account in the orphans' court, showing certain balances due to the residuary legatees under the will of his testator; and very soon thereafter suits were instituted on the administration bond, at the instance and for the use of some of such legatees, against the complainant as executor of Coates, and also against Alexander H. Seth, the surviving administrator, and against the executrix of Frazier, and also against Hall, the surviving executor of Grafton. In these suits recoveries were had as against the complainant; but, as against Seth, the judgments were unavailing, because of his insolvent condition, and as against Frazier's executrix there were no assets to be bound by judgment, and Hall, as the surviving executor of Grafton, successfully resisted recovery against him, on the ground that he had fully administered the estate of his testator before he was notified of the claims. Consequently, the complainant, as executor of Coates, was required and did pay, in 1874, not only the legacies for which judgments were recovered, but other legacies for which the bond was bound, amounting in the whole to the sum of $4,765.

Upon the facts, as detailed in the bill, the complainant prays that the legatees or distributees of the estate of Grafton may contribute their respective proportions to reimburse him, as the executor of Coates, to the extent of one-half of the amount which he has been required to pay to the legatees under the will of Robert Seth.

This application is resisted upon the ground that the estate of Grafton is entirely and completely exonerated from any and all obligation created by the bond, by reason of the death of Grafton and the full administration of his estate before the existence of the claims was notified to his executor, and that, consequently, there is no right of contribution that can be maintained by the complainant as against the legatees or distributees of the co-surety's estate.

That the executor of Grafton was exonerated, if he fully administered the estate and paid it over to the legatees or distributees without due notice of the claims, and after giving the notice by advertisement as required by the statute, may readily be conceded. * * *

The law [the state statute] is very explicit * * * in providing for the exoneration of the executor, upon his observing certain precautions; but it is to be noticed and borne in mind that it is the executor or administrator personally that is to be exonerated and discharged, and not the estate of the decedent. It is nowhere declared or intimated that there should be no remedy for a creditor who may have failed to authenticate and notify his claim to the executor, before final administration, or that, if the creditor's claim be not ascertained or provable before such final settlement and distribution, he should be without remedy, notwithstanding his debtor's assets may be shewn to be abundant, simply because the executor or administrator may have delivered them over to legatees or distributees. It would be strange, indeed, if such were the provisions of the law. What would be the predicament of an absent creditor, who might be totally ignorant of either the death of his debtor, or of the administration of his estate? What would become of parties dependent for their protection and security upon official bonds, guardian bonds, trustees' bonds, and the like, where the breach has not occurred, or, if occurred has not been ascertained at the time of the final settlement and distribution of a surety's estate, if the position of the defendants in this case be sustained? Surely the law never contemplated the total discharge of the deceased surety's obligation in all such cases. In this case, the amounts for which the bond was ultimately liable, were not ascertained until October, 1873—about three years after the final settlement and distribution of Grafton's estate. Until these amounts were ascertained, and actually paid by the complainant, as the representative of the co-surety Coates, there was no claim provable by him against the estate of Grafton. No laches therefore can be imputed to him in not exhibiting the claim for contribution before distribution of Grafton's estate by his executor.

In England, as is well known, prior to Lord St. Leonards' Act, 22 and 23 Vict. c. 35, it was the established practice for administrators and executors to administer their estates under the orders and decrees of the Court of Chancery, and one great object in resorting to that jurisdiction by the executor or administrator was to obtain indemnity and protection against all future liabilities after final settlement. The creditors were required to come in and prove their claims under the decree, just as they are required to come in and prove their claims under the notice given by the executor or administrator by the order of the orphans' court, in our practice. Those failing to come in and prove their claims before final settlement and distribution of the estate, lost their remedy against the executor or administrator, but not as against the legatees or distributees. The same exoneration of the executor or administrator afforded in England by the decree in chancery, is provided for with us by statute.

In the case of Waller v. Barrett, 24 Beav. 413, an administration suit, Lord Romilly, the Master of the Rolls, in speaking of the effect of the omission of the creditor to come in and prove his claim under

the decree, said: "In the first place, I hold this to be established by the authorities, that if breaches of covenant have been committed at the date of the decree, and the covenantee do not come in and prove under the decree, he will be barred of all remedy against the executors, and that the executors will be perfectly safe. It is the case of an existing debt, which the creditor does not come in and prove under the decree, and the court having administered the assets protects the executors against all future claims. The creditor, however, is not left without his remedy, but that remedy is not against the executor. That principle is so fully established in this court, that it is unnecessary to cite many authorities on the subject; but this is what Lord Eldon says in Gillespie v. Alexander, 3 Russ. 136, on the subject: 'If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees to bring back the fund he may do so; but he cannot affect the legatees except by suit, and he cannot affect the executor at all.'"

The authorities are exceedingly numerous upon this subject, all maintaining the same general doctrine, several of which are referred to by the Master of the Rolls, in Waller v. Barrett, and, among others, he refers to the case of Knatchbull v. Fearnhead, 3 Myl. & Cr. 122, in which Lord Cottenham said: "Where an executor passes his accounts in this court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in this court, he does it at his own risk." And to refer again to the case of Waller v. Barrett, the Master of the Rolls, in another part of his opinion, made these observations: "I am at a loss to conceive on what principle a debt which may arise hereafter, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time; he may be ignorant of the whole proceedings, and yet if he do not come in and claim, his only remedy in this court is against the legatees." And in the case of March v. Russell, 3 Myl. & Cr. 31, referred to in argument, Lord Chancellor Cottenham treated the doctrine as one of the oldest and best established of the court. He there said: "That a creditor may follow assets in the hands of the legatees to whom they have been delivered in ignorance of the creditor's demand, has been an established principle of this court from the earliest period, of the decisions in which we have any traces."

And in accordance with these, and many other authorities maintaining the same general principle, Mr. Justice Story has stated the doctrine as one as firmly established as any in the equity jurisprudence of the country. In 2 Eq. Juris., § 1251, the learned author says: "But the legatees and distributees, although there was an original deficiency of assets, are not at law suable by the creditor. Yet he has a clear right in equity, in such a case, to follow the assets of the testator into their hands, as a trust fund for the payment of his debt. The legatees and

distributees are in equity treated as trustees for this purpose; for they are not entitled to anything, except the surplus of the assets after all the debts are paid." This just and equitable doctrine formed a part of the system of jurisprudence implanted here from the mother country, and there is nothing in our testamentary system that at all militates against its continued operation. Indeed, it has been fully recognized by this court in the case of Kent v. Somervell, 7 Gill & J. 265, 270, and has been applied and acted on in the case of Hanson v. Worthington, 12 Md. 418, with respect to a legacy erroneously paid. See, also, Somervell v. Somervell, 3 Gill, 276, 43 Am. Dec. 340.

Now, in England, by St. 22 & 23 Vict. c. 35, § 29, very much the same kind of notice by advertisement is required to be given to creditors to produce their claims to the administrator or executor, as that required to be given by our Code. It is provided that at the expiration of the time named in the notice for sending in such claims, the executor or administrator shall be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has notice, and shall not be liable for the assets, or any part thereof, so distributed, to any person of whose claim such executor or administrator shall not have had notice at the time of distribution. But it is declared that nothing in the act shall be taken in any manner to prejudice the right of the creditor to follow the assets so distributed into the hands of the persons to whom distribution may be made; the object and design of the act being to avoid the expense and delay attending administration suits, and to afford to the executor or administrator the same protection that he would have under a decree in chancery. Clegg v. Rowland, L. R. 3 Eq. Cas. 368. This same protection was designed by the sections of the Code to which we have referred, and hence, by the terms of the statute, only the executor or administrator is exonerated from liability upon final administration of the assets, and not the estate or those to whom it has been distributed. * * *

We need not say more to justify the conclusion that while the executor of Grafton may be exonerated, there has been no discharge from, or extinguishment of, the obligation of the bond, as to Grafton's estate, by reason of the fact that the estate was administered and distributed before the claim of the complainant was presented. Such conclusion is but the natural and irresistible deduction from the principles which we have stated. * * *

2. As to the question of the complainant's right to contribution as against the legatees who have received the estate of the deceased cosurety, that has been virtually answered affirmatively in what has been said in reference to the first question considered; and we think it clear beyond doubt. If the bond was still liable at the time of payment, the implied obligation, founded in natural justice and equity, was operative to entitle the surety or his personal representative paying the

debt to contribution from the estate of a deceased co-surety. * * * Each legatee or distributee is liable to make contribution in due proportion to the amount received by him. Gillespie v. Alexander, 3 Russ. 130. * * *

Decree reversed, and cause remanded.

HOLT v. LIBBY et al.

(Supreme Judicial Court of Maine, 1888. 80 Me. 329, 14 Atl. 201.)

Exceptions from Supreme Judicial Court, Cumberland county.

Trustee process to recover a legacy due the principal defendant. The trustees claimed that the legacy was offset by debt due from the legatee to the estate. The plaintiff replied that the debt was barred by the statute of limitations. The opinion states the other material facts.

PETERS, C. J. It is a general rule, in the settlement of legacies by an executor, that he may retain the legacy—the whole or a sufficient portion—in satisfaction of the legatee's debt to the estate if the testator does not indicate, either in the terms of the bequest or in other parts of the will, that it shall be otherwise. This is the rule both in law and equity.* The English practice goes further, and allows the rule to prevail, on the idea of lien, as to debts which have become barred by the statute of limitations. The leading case maintaining the English rule seems to be Courtenay v. Williams, 3 Hare, 539. Subsequent English cases follow in the same line. Rose v. Gould, 15 Beav. 189; Coates v. Coates, 33 Beav. 249; 1 Redf. Wills, 489, and cases cited in note. One or two of the American state courts may have practiced on the English rule. But a legacy was recoverable in England, in the day of the authorities cited, only in chancery. The same rule of equitable set-off prevails in that country, not only as to legacies, but also as to the share of one entitled as next of kin in the estate of an intestate. In re Cordwell's Estate, L. R. 20 Eq. 644. The reason assigned in the latter case for the rule is that, "until the debtor discharges his duty to the estate by paying the debt he owes to it, he can have no right or title to any part of it under the statute."

This doctrine cannot be applicable in this state, and in most of the states, where a legacy is made by statute, if not by ancient practice, a legal claim. With us it is a distinct and independent legal claim. The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate. Each has a legal right and remedy, and a statute-barred debt is not more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine. Observation leads us to believe that a testator is more likely to intend to remit than to collect such debts, when nothing is declared of them by him in his will, especially debts against his children and relatives. In many in-

*On his duty to retain for his own debt to the estate, see 6 Am. & Eng. Ann. Cas. 810, note.

stances such claims are covered by the dust of time and forgotten, though found by executors after the death of the testators. In many other instances the advances are intended as benefactions and gifts, conditioned upon some unforeseen circumstance arising to make it expedient to regard them as debts. The question under discussion has been in Maine already practically, and in Massachusetts expressly and fully, decided in accordance with these views. Wadleigh v. Jordan, 74 Me. 483; Allen v. Edwards, 136 Mass. 138.

The other question of the case is whether a plaintiff who attaches a legacy by the trustee process is permitted to set up the limitation bar to an offset claimed by an executor against the debtor legatee. We think it is both logical and reasonable that the creditor should have the same right to the thing attached, and all its incidents, that the debtor has. If his attachment becomes perfected, the debtor's right becomes his right, and he should have the power to save and protect it as if his own. The law can make an assignment of the legacy as effectually as the legatee himself can. Otherwise we should, in the present case, have, as has been suggested, the curious result of an attaching creditor failing to collect a legacy which his debtor can collect. It would allow an assignor to enjoy the benefit of a claim, the title to which had legally passed to an assignee. The principle involved in this point has been virtually settled in favor of the plaintiff by the case of Sawyer v. Sawyer, 74 Me. 580, and the very satisfactory reasoning in that case is as pertinent to the facts in this case as to the facts there. By Rev. St. c. 65, § 31, any legatee of a residuary or specific legacy under a will may recover the same in a suit at law. The word "specific" is not here used in a strictly technical testamentary sense, but means definite, particular, or special. Any legacy may be recovered by legal remedy, unless, from exceptional reasons, equity should be resorted to.

Exceptions sustained.

WALTON, VIRGIN, LIBBEY, FOSTER, and HASKELL, JJ., concurred.[31]

[31] See Wilson v. Smith (C. C.) 117 Fed. 707–709 (1902), where cases pro and contra are cited. See, also, Leask v. Hoagland, 64 Misc. Rep. 156, 118 N. Y. Supp. 1035 (1909); Ex parte Wilson, 84 S. C. 444, 66 S. E. 675 (1910), and cases post, pp. 748, 751.

In Gosnell, Trustee, v. Flack, 76 Md. 423, 426, 427, 25 Atl. 411, 412, 18 L. R. A. 158 (1892), McSherry, J., said: "The right of an administrator to retain from the share of a distributee the amount due by the latter to the intestate out of whose estate he is entitled to a share is undeniably clear. Smith & Talbott v. Donnell, Ex'r, 9 Gill, 84; Manning v. Thurston et al., 59 Md. 218. And we think it equally clear that this right exists where the debt has been incurred to the estate itself by the distributee as administrator after the decedent's death. 2 Woerner on Adm. § 564. * * * It would be contrary to the plainest principles of justice to allow an administrator, who is also distributee, and who is indebted to the decedent, or who by reason of a subsequent defalcation becomes indebted to the estate, to escape the payment of his indebtedness if he happens to be insolvent, and besides that to receive his full, unabated distributive share. In such a case there is no question of impounding or intercepting a legal estate to satisfy in equity a delinquent trustee's malversations. It is merely an application of the doctrine of set-off." In In re Abrahams, Abrahams v. Abrahams, [1908] 2 Ch. 69, it is held that, "where at the death of a testator a debt is owing to him

GITTINS v. STEELE.

(High Court of Chancery, 1818. 1 Swanst. 199.)

In preparing the minutes of the decree on the appeal in this case (reported 1 Swanst. 24), a question arose whether in refunding so much of the legacy of £7,000 as had been paid out of the personal estate, the legatees of that sum, who were also residuary legatees, should be charged with interest.

The LORD CHANCELLOR [ELDON]. Where the fund out of which the legacy ought to have been paid is in the hands of the court making interest, unquestionably interest is due. If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment I apprehend that the rule of the court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice must be done out of his share.

The order directed payment of interest at the rate of 4 per cent. Reg. Lib. A. 1817, fol. 1689.[32]

In re WEST.

WEST v. ROBERTS.

(Supreme Court of Judicature, Chancery Division. [1909] 2 Ch. 180.)

Action.

By her will, dated February 25, 1898, Emma J. West devised and bequeathed her residuary real and personal estate to her executors and trustees upon trust for sale and conversion, and directed them to hold the net proceeds (after providing for debts, funeral and testamentary expenses, legacies, and annuities) upon trust for her children, Charles, Josephine, Isabelle, and Clara, in equal shares. Each share

by a person to whom a share of residue is immediately given by the will, but the debt is payable by installments, the executors are not entitled to retain the share of the beneficiary as against the future installments of the debt that may become due, but are bound to pay it to the beneficiary without reference to such installments" (syllabus). On whether an heir's indebtedness to the estate forms a counterclaim or set-off against his distributive share of the proceeds of a sale of the realty to pay debts, see 4 L. R. A. (N. S.) 189, note.

On the statute of limitations as a defense to actions or suits for legacies and distributive shares, see 18 Am. & Eng. Ency. Law (2d Ed.) 803–805.

[32] "If, however, any one or more of the residuary legatees has received more than his or her equal share of the funds for division, then to the extent of such excess such legatee has received money not belonging to him or her, as the case may be, and is bound to refund the same, with interest, to the executors or persons representing them, or, in this case, where all the parties are before the court, to those who have been underpaid, in order to avoid circuity of action. Inasmuch, however, as under the view which we shall take of other exceptions, it is altogether improbable that any of the residuary legatees will be found to have been overpaid, we need not dwell further upon this subject." McIver, C. J., in Buerhaus v. De Saussure, 41 S. C. 457, 491, 19 S. E. 926, 944 (1894).

was settled as therein mentioned, the son taking a protected life interest, and the daughters life interests without power of anticipation.

By a first codicil, dated October 17, 1902, the testatrix revoked the provisions for the settlement of Josephine's and Isabelle's shares and gave them their shares absolutely.

The second codicil, of March 13, 1903, is not material.

By a third codicil, dated July 27, 1903, the testatrix bequeathed one-third of her preference and ordinary shares in J. & E. Atkinson, Limited, to Josephine, one-third of the same shares to Isabelle, and one-third of the same shares to her trustees upon the trusts of Clara's fourth share of residue.

The fourth codicil, of April 2, 1904, is not material.

The testatrix died on July 17, 1904, and her will and four codicils were proved on August 30, 1904. After first transferring the shares into their own names as shareholders, the executors and trustees duly transferred one-third of the shares to Josephine and one-third to Isabelle and retained one-third as trustees of Clara's settled share.

On December 8, 1907, the testatrix's sister-in-law, Mrs. King, died. Among her papers was a sealed envelope on which the testatrix had written: "To be opened only after the death of Mrs. King should I predecease her. If occasion demands to be returned to Emma J. West, 19 Clevedon Square, Hyde Park W."

This envelope contained a fifth codicil, dated June 16, 1904, whereby the testatrix revoked the third codicil and bequeathed a fourth part of the Atkinson shares to each of her children Josephine, Isabelle, and Charles absolutely, and a fourth part to Clara in settlement according to the will.

On January 9, 1908, the original probate of the will and four codicils was revoked, and on November 28, 1908, new probate of the will and five codicils was granted to the same executors.

In the meantime, namely, on February 26, 1908, the plaintiff Charles brought this action to recover one fourth of the shares and one fourth of the dividends from the testatrix's death from the defendants Josephine, Isabelle, and Clara and the trustees respectively. Josephine and Isabelle admitted the plaintiff's right to the shares and transferred their proportion pending the action. Clara was willing that the trustees should transfer on the order of the court.

The defendants did not, however, admit the plaintiff's right to share in any dividends paid before December 8, 1907, when the fifth codicil was discovered.

SWINFEN EADY, J. (after stating the facts). The defendants do not dispute that the plaintiff is entitled to the shares bequeathed to him by the fifth codicil, which were erroneously but inadvertently transferred to the wrong persons, but they contend that the plaintiff is not entitled to the dividends which in the meantime they have received and retained for their own use.

It is exceedingly difficult to see any principle upon which the defendants, whilst conceding that they are not entitled to retain the shares given to their brother by the fifth codicil, are yet entitled to retain for their own use the dividends on those shares which were not really bequeathed to them at all. It is said that where a legatee has been ordered to refund either in respect of a pecuniary legacy or in respect of a share of residue, such refunding under the rule laid down in Gittins v. Steele, 1 Swans. 199, is without interest; but it appears to me that the reasoning has no application to a case of this kind, where the legacy is of specific shares, because upon the assent of the executors those shares vest in the legatee, and the assent, when given, has relation to the time of the testatrix's death. In the case of a specific legacy it is well established that immediately after the executors' assent the legacy vests in the legatee, and he can maintain an action at law in respect of it. If the plaintiff has a legal right to the shares as from the testatrix's death, it seems to me that he has also a legal right to the interest or dividends.

In Williams on Executors (10th Ed.) p. 1108, it is said: "The assent of an executor shall have relation to the time of the testator's death. Hence, in the case of a devise of a term of years in tithes, in an advowson, or in a house or land, if after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the undertenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests."

In Saunders' Case, 5 Rep. 12b, it is said that "if lessee for years devises his term to another, and makes his executors, and dies, the executors do waste, and afterwards assent to the devise, in that case, although between the executors and the devisee it hath relation, and the devisee is in by the devisor, yet an action of waste shall be maintainable against the executors in the tenuit."

It was rather suggested that the assent, if any, in this case under the second probate was subject to the intermediate improper application of the dividends, but I cannot accept that view. The legacy was assented to and the usual consequences must follow. The legatee became entitled to the legacy as from the testatrix's death.

With regard to the analogy between a pecuniary legacy or share of residue and a specific legacy, it is pointed out in Williams on Executors (10th Ed.) pp. 1566, 1567, that no action at law lies against an executor for a general legacy or share of residue. "But the law is different with respect to specific legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee, because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor." The executor can only assent to the legacy in favor of the legatee to whom it is given, not in favor of a stranger, and the only person to whom these shares that I have to deal with were given was the plaintiff.

I therefore determine that the plaintiff is entitled to the shares be-

queathed to him, that he is entitled to these shares as from the testatrix's death, and that this bequest carries the intermediate income, including the right to recover that income from those who have received it.

SECTION 4.—THE EXONERATION OF MORTGAGED PROPERTY.

HALLIWELL v. TANNER.

(High Court of Chancery, 1830. 1 Russ. & Myl. 633.)

The testator, having three leasehold estates, bequeathed them to three different persons; and, one of them being subject to a mortgage made by him, he directed the mortgage money to be paid out of his residuary personal estate. The personal estate being insufficient for that purpose, a question was made, whether the legatees of the two other leasehold estates should contribute rateably with the leasehold estate in mortgage towards payment of the mortgage debt.

THE MASTER OF THE ROLLS [Sir JOHN LEACH]. In the case of Oneal v. Mead, 1 P. Wms. 693, it was decided that, as between a devisee of a mortgaged fee simple and a specific legatee of personalty, the devisee should not have his mortgage paid by the specific legatee, but shall take the mortgaged fee simple cum onere. A fortiori, a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold. The direction, that the mortgage debt should be paid out of the residuary personal estate, merely follows the general rule of law; and, that fund failing, the legatee of the mortgaged leasehold must take it cum onere.[33]

[33] Contribution from the other devisees was denied a devisee, where land devised to him was mortgaged after the making of the will, in Frasier v. Littleton, 100 Va. 9, 40 S. E. 108 (1901).

LOCKE KING'S ACTS.—The present English law on the exoneration of mortgaged realty is thus stated by Maitland:

"In discussing the order of assets we have spoken as though all the debts were unsecured; but what of secured debts? Among the debts owed by the dead man there was one debt which was secured by a mortgage of Blackacre. Does the fact that this debt was thus secured make any difference when we are discussing the question what fund is the primary fund for its payment? The old answer to this question was (as a general rule), none at all. Here is a debt and it must be paid like other debts. If the dead man has not made a will and therein given some direction to the contrary, the first fund for the payment of his debts, including this debt, consists of his general or residuary personalty. Put the simplest case. He owed £1,000 upon mortgage of Blackacre, of which, subject to the mortgage, he was tenant in fee simple. He dies intestate. His real estate, including Blackacre, descends to his heir at law, while his personalty will be distributed among his next of kin. But first debts must be paid, including the mortgage debt on Blackacre, and all his personalty must be swallowed up in paying debts before any part of his realty, including

Appeal of HOFF.

(Supreme Court of Pennsylvania, 1855. 24 Pa. 200.)

WOODWARD, J.[34] * * * The testator devised to his wife, the appellant, for life, the house in which he dwelt on Chestnut street, together with the policy of insurance and furniture. When he purchased the house in 1847, there was a mortgage resting on it for $8,400, made by a former owner, and his will is silent in regard to the payment of the mortgage. The executors paid it off out of the personalty, and took an assignment; but the creditor and the court of common pleas refused to allow them a credit for it on the ground that the widow took the estate cum onere, and that she must pay the mortgage. She appeals, and the question is whether the mortgage is chargeable on her estate or on the personalty.

The will contains, in the introductory clause, the usual direction as to payment of debts, a phrase which in England is necessary to charge debts on the realty, but wholly unnecessary here, where lands as well as personal estate are bound for every decedent's debts. Still the words "after the payment of my lawful debts," cannot be treated as meaning nothing; and if they are to have any significance, it must be that the executors should pay the debts before distribution be made of the estate in pursuance of the will. A debt secured by a mortgage of the testator's own making, is no less a debt within the meaning of the introductory phraseology of wills than a promissory note; and executors are as much bound to pay the one as the other. The reason assigned in the English cases for throwing such a mortgage upon the personalty, is that the personal estate has been benefited by the making of the mortgage; a reason for which we stand in no need, though it is as applicable here as there. As to the mortgagee, the mortgage is a specific lien, and he cannot be restrained from resorting to the land pledged; and as between him and other creditors, he will often be

Blackacre, could be touched. This seemed unfair, and by three acts, the first of which is always spoken of as 'Locke King's Act,' Parliament has tried to set this matter straight. The three acts are 17 & 18 Vict. c. 113 (1854), 30 & 31 Vict. c. 69 (1867), and 40 & 41 Vict. c. 34 (1877). The last of these acts says in effect that in the administration of the estate of any testator or intestate dying after the 31st of December, 1877, seised or possessed of any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum by way of mortgage or any other equitable charge, including a lien for unpaid purchase money, the devisee or heir at law shall not be entitled to have such sum satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall have signified a contrary intention, and that a contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts out of residuary real and personal estate or residuary real estate. That, at least for the time being, is the last word in the history of a muddle." Maitland's Equity and the Forms of Action at Common Law, 212, 213. On Locke King's Acts, see In re Birch, [1909] 1 Ch. 787.

[34] The statement of facts and a small part of the opinion are omitted.

compelled to do so in relief of other funds; but as between the mortgagor and his representatives, his mortgage is evidence of indebtedness; and where there is nothing in the will to control their action, it is their plain duty to pay it. And to excuse them there must be a clear declaration of intention that the devisee of the mortgaged premises is to take them cum onere. Thus it is settled, says Powell, on the authority of a great number of cases (see his work on Devises, vol. 11, p. 671), that a devise of mortgaged lands, subject to the mortgage thereon, does not throw the charge on the estate so as to exempt the funds which by law are antecedently liable, as the testator is considered to use the terms merely as descriptive of the encumbered situation of the property, and not for the purpose of subjecting his devisee to the burden.

But how is it where the estate comes to the devisor encumbered by a mortgage made by a former owner? If it come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate cum onere, and the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection, or contract, or communication with the mortgagee, and have done no act to show an intention to transfer the debt from the estate to himself. What dealings will have the effect to make the mortgage his own debt, have been debated in a great variety of cases, several of which counsel have cited in their paper-books. It seems that paying the mortgagee a higher rate of interest, and indemnifying the vendor against the mortgage, both which occurred in this case, are not such acts on the part of the purchaser as make him personally liable for the mortgage debt. Shafto v. Shafto, 2 Cox's P. W. 664; Woods v. Huntingford, 3 Ves. 128.

The court below ruled the question on this ground. The learned judge said, it must appear that he (the testator) has done some act by which he has made himself directly liable to the owner of the encumbrance; and then he ruled that the evidence submitted to the auditor was insufficient to shift the obligation from the real to the personal fund. We agree that some act must be shown, indicative of an intention to take the mortgage upon himself, and the court were, perhaps, right in setting aside the evidence of payment of an increased rate of interest, and certainly right in disregarding the declarations of the testator, made to persons having no interest in the subject; but they overlooked one important and decisive fact, which was in full proof before the auditor, to wit, that Hoff purchased not merely the equity of redemption in this house and lot, but the entire interest, and that the mortgage formed part of the price of the estate. The proof was that he bought of William Reynolds and wife for $13,900; that he paid $5,500, which, with this mortgage of Elmes to Harvey of $8,400, was "in full the consideration for the premises." The receipt of Reynolds, indorsed on his deed to Hoff, stipulates, moreover, that the said

mortgage and the interest due, and to grow due, thereon are to be paid by the said John Hoff.

Now, it is immaterial whether this amounted to a covenant on the part of Hoff to pay the mortgage, though, according to the doctrine of Campbell v. Shrum, 3 Watts, 60, and the cases there cited, it might be easy to say it did, but surely there can be no doubt he would be liable to an action for money had and received, at the suit of the mortgagee. As was said in the case of the Earl of Belvidere v. Rochfort, cited in 2 Powell on Devises, 679, the plain intent of the deed was to put the purchaser in the place of the vendor, and that he might not be longer liable to the mortgagee, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he himself had covenanted to pay it off, and either the vendor or mortgagee might, upon that contract, have compelled him to pay it off. The decree in that case was confirmed by the House of Lords, and though some doubt has been thrown upon it by Lord Thurlow in Tweddell v. Tweddell, 2 B. C. C. 107, and by Lord Alvanley, in Woods v. Huntingford, still its good sense is its sufficient vindication, and commends it to our acceptance. Nor is the doctrine of that case destitute of support from authorities of high respectability, as may be seen by consulting Billinghurst v. Walker, 2 B. C. C. 608; Cope v. Cope, 2 Salk. 449, 2 Ch. Ca. 5; Pochley v. Pochley, 1 Vern. 36; King v. King, 3 P. W. 360; Galton v. Hancock, 2 Atk. 436; Robinson v. Gee, 1 Vesey, 251; Phillips v. Phillips, 2 Bro. C. 273; Johnson v. Milkrop, 2 Vern. 112; Balsh v. Hyam, 3 P. W. 455.

If, then, Hoff, in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remained unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase money enough in his hands to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in assumpsit if not in covenant; but, not being paid in the lifetime of Hoff, his personal estate had the benefit of it, and it went into the hands of his executors for the payment, first of all, of his "lawful debts." He had no debt more lawful than this mortgage, and there is great precision in the equitable principle which devotes that money in the executor's hands to the satisfaction of this debt.

But that principle is applicable only when there is no controlling testamentary intention expressed. If it were deducible from the whole will, that the testator meant his widow should pay the mortgage out of her life estate, we should be obliged to say so—for the will is the law of his estate. But no such intention is manifest.

It is clear, however, beyond all doubt, that he meant the bulk of his personal estate should go to legatees in the form of pecuniary legacies; and it seems to be settled, that the devisee of a mortgaged estate is not entitled to be exonerated out of personal estate specifically bequeathed. Neal v. Mead, 1 P. W. 693. And the same rule, it has been decided, extends to pecuniary legacies. Lutkins v. Leigh, Cases in Time of Talbot, 3; Hamilton v. Morely, 2 Vesey, Jr. 65. In Ruston v. Ruston, 2 D. 243; s. c. 2 Y. 54, we have a discussion of many of the principles I have adverted to; and, under a devise of mortgaged premises, it was held that the personal estate of the testator shall not go in ease of the mortgaged premises, so far as to defeat specific or ascertained pecuniary legacies, or any part thereof; aliter of the legacies of the residuum.

On this ground the decree of the court can be sustained so far as the ascertained legacies under the will are concerned, but not as to the residuum, and the auditor's report shows that there will be a residuum, though not of sufficient amount to pay off the mortgage. Whatever there is must be applied to the mortgage in ease of the widow's life estate. The auditor distributed this under the 13th clause of the will; but so much of the decree as sustains this distribution must be reversed. If that clause be regarded as a bequest of additional legacies, it is so general and indefinite in terms as not to exempt the portion of the estate to which it applies from contribution to the mortgage. * * *[35]

In re HUNT.

(Supreme Court of Rhode Island, 1895. 19 R. I. 139, 32 Atl. 204, 61 Am. St. Rep. 743.)

MATTESON, C. J. This is a case stated for the opinion of the court. Rowland L. Rose, died intestate September 19, 1894, seised and possessed of a parcel of land on the southwest corner of Bridgham and Greenwich streets in Providence, particularly described in the petition. This parcel of land was formerly owned by Dexter N. Knight who mortgaged it to the Mechanics' Savings Bank to secure the payment of his note for $25,000, dated January 23, 1869. On February 13 following, Knight conveyed the equity of redemption in the mortgaged property to Gorham Thurber who assumed the payment of the mort-

[35] See Raftery v. Monahan, 22 R. I. 558, 48 Atl. 940 (1901).
On the right to exoneration, see 6 Prob. Rep. Ann. 631, note; 11 Prob. Rep. Ann. 435, note; 3 L. R. A. (N. S.) 898, note.

gage and guaranteed the payment of the mortgage note by a guaranty written on its back. The trustees of the estate of Thurber conveyed the property to Rose subject to the mortgage by deed dated May 11, 1889. The consideration named in this deed was $10,000, which was the sum paid by Rose for the equity of redemption. He also assumed the payment of the mortgage by a clause in the deed to him as follows: "Said premises are subject to a mortgage of twenty-five thousand dollars ($25,000) to the Mechanics' Savings Bank payment of which is assumed by the grantee." On July 22, 1889, the Mechanics' Savings Bank transferred the mortgage to the Citizens' Savings Bank. Rose thereupon as a consideration for the transfer signed an agreement on the back of the note as follows: "Waiving demand, notice and protest, I hereby guarantee the full payment of the within note; future payments of principal or of interest in renewal thereof not releasing me as indorser." The interest on the note has been paid to January 23, 1895. The administrator, widow and heirs at law of the deceased have concurred in stating the foregoing facts to obtain the opinion of the court on the question whether the heirs are entitled to have the mortgage paid out of the personal estate in exoneration of the real, or whether the real estate descended to them subject to the incumbrance of the mortgage.

The general rule as between the real and personal representatives is that the personalty is the primary fund for the payment of debts: and this rule is not changed by the fact that the debt is secured by a mortgage on the realty given by the deceased. Gould v. Winthrop, 5 R. I. 321; Atkinson v. Staigg, 13 R. I. 725; 2 Williams on Executors, 1042. The rule extends, however, only to incumbrances created by the deceased himself; if the estate has come to him already mortgaged, the estate is the primary fund for the payment of the debt and on his death passes to his devisee or heir at law subject to the incumbrance, unless he has so dealt with the mortgage debt as to make it his own personal debt. Gould v. Winthrop, 5 R. I. 321. The question, then, resolves itself into this: Did the deceased, purchasing the equity of redemption, by assuming the payment of the mortgage debt in the manner stated, or by guaranteeing the payment of the note on the transfer of the mortgage from the Mechanics' Savings Bank to the Citizens' Savings Bank, make the mortgage debt, as between his real and personal representatives, his personal debt?

The assumption of the mortgage by Rose was equivalent to a covenant with his grantors to indemnify them against the mortgage debt, or to a covenant with them to pay the debt. Mount v. Van Ness, 33 N. J. Eq. 262, 265. Entering into covenants like these, it is held, does not sufficiently show an intention on the part of the purchaser to transfer the debt from the estate to himself, as between his heir and executor or administrator, to have that effect. Evelyn v. Evelyn, 2 P. Wms. 664; Tweddell v. Tweddell, 2 Bro. Ch. 101, 152; Woods v. Huntingford, 3 Ves. 128; Butler v. Butler, 5 Ves. 534; Waring v.

Ward, 7 Ves. 332; Earl of Oxford v. Lady Rodney, 14 Ves. 417; Barham v. Earl of Thanet, 3 Myl. & K. 607; Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; Keyzey's Case, 9 Serg. & R. (Pa.) 71, 73; Mount v. Van Ness, 33 N. J. Eq. 262. And the rule is the same even though the purchaser has rendered himself liable at law to the mortgagee for the payment of the mortgage debt. Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492.

Nor was the guaranty on the back of the note by Rose sufficient to manifest an intention on his part to make the debt his own in such wise as to change the natural course of assets. It was merely a collateral undertaking in no way affecting the original contract between the mortgagor and the holder of the mortgage, which remained after the guaranty precisely as before.

To have the effect of transferring the debt from the estate on which it is charged to the personal estate, the dealing between the purchaser and the mortgagee must go to the length of changing the terms of the original contract so as virtually to constitute a new contract; as for instance, arranging for different times or modes of payment, or for an additional loan with a new mortgage including the old as well as the new loan, etc. Billinghurst v. Walker, 2 Bro. Ch. 603; Woods v. Huntingford, 3 Ves. 128; Waring v. Ward, 7 Ves. 332; Earl of Oxford v. Lady Rodney, 14 Ves. 417; Barham v. Earl of Thanet, 3 Mylne & K. 607; Creesy v. Willis, 159 Mass. 249, 34 N. E. 265; 2 Jarman on Wills, 1449.

We are, therefore, of the opinion (1) that the estate described in the petition descended to the heirs at law of Rowland L. Rose charged with the burden of the mortgage for $25,000; (2) that he did not by assuming payment of the mortgage nor by guaranteeing payment of the mortgage note charge his administrator with the payment of the mortgage debt; (3) that the administrator will not be justified in paying the mortgage debt out of the personal estate which may come to his hands.[36]

[36] See Hetzel v. Hetzel (N. J. Ch.) 71 Atl. 755 (1908), to the effect that in New Jersey "the assumption of a mortgage does not make the debt a personal one of the grantee covenantor," and hence assumed mortgages are not "debts in a technical sense." See, also, Creesy v. Willis, 159 Mass. 249, 34 N. E. 265 (1893) where the court explains that "it is well settled in this commonwealth that a promise made by a purchaser of an equity of redemption, by accepting a deed poll from his grantor, to pay the mortgage debt, is not a promise which can be enforced by the mortgagee by an action at law in his own name, or in the name of the grantor without his consent." See, also, Monoghan v. Collins (N. J. Ch.) 72 Atl. 109 (1909).

In Nebraska, where the assumption of the mortgage debt makes the grantee personally liable therefor, the heirs and devisees are entitled to exoneration. Schade v. Connor, 84 Neb. 51, 120 N. W. 1012 (1909). See, also, Mosier v. Bowser, 226 Ill. 46, 55, 56, 80 N. E. 730 (1907).

For the rule where taxes levied on testator's real estate in his lifetime are to be paid, see In re Hewitt, 40 Misc. Rep. 322, 81 N. Y. Supp. 1030 (1903).

TURNER v. LAIRD.

(Supreme Court of Errors of Connecticut, 1896. 68 Conn. 198, 35 Atl. 1124.)

Suit to determine the construction of the will of Robert Balfour, deceased.

The parts of the will particularly brought in question were the ninth, tenth and eleventh articles, which were printed in the report of the case of Turner v. Balfour, 62 Conn. 89, 90, 25 Atl. 448. By the ninth article, "the Geer house" was devised to the testator's grandson Robert Balfour, in fee, subject to a life estate in his widow. By the tenth, half of his residuary estate was left to a son for life, remainder to the same grandson, in fee, and the other half to another son, in fee. By the eleventh, in case Robert Balfour should die, leaving no issue, "his share" was given to the testator's "six children, share and share alike."

All the personal estate was consumed in paying debts, legacies, and charges of settlement. The "Geer house" and a store building forming part of the residuary estate, were each subject to a mortgage made by the testator after the execution of his will, to secure his note to a savings bank for a sum less than half the value of the property so mortgaged. No claim on these notes was ever presented against the estate, and the time limited for the presentation of claims had expired; but one payment of interest on the "Geer house" mortgage was made by the administrator, before the time so limited had expired. Interest on both mortgages had been fully paid by the administrator. Robert Balfour died without issue, during the life of the widow.

The questions presented were whether either or both these mortgages ought to be paid off by the administrator, and if so, out of what funds. The case was reserved for the advice of this court, on the complaint and answers.

BALDWIN, J.[37] A specific devise of land, mortgaged by the testator to secure his own debt, prima facie imports an intention that such debt shall be satisfied out of the general personal assets. Hewes v. Dehon, 3 Gray (Mass.) 205. In the case at bar, this presumed intention, with respect to the "Geer house," finds additional support in the provision made by the testator in the first article of his will, directing his executor to pay all his just debts and funeral expenses and the legacies subsequently given out of his estate. The word "debts," in such a connection, includes mortgage debts. Bishop v. Howarth, 59 Conn. 455, 465, 22 Atl. 432.

That the holders of the mortgages in question did not present their claims against the estate, did not, as between the executor and the devisees of the mortgaged property, discharge his obligation to pay them off. The extent of the testator's bounty to his grandson could

[37] The statement of facts is slightly abbreviated.

not be thus reduced by the acts or omissions of third parties. The plaintiff's duty was the same as if the devise of the "Geer house" had been followed by an express direction that any mortgage upon it should be paid by the executor. A payment thus required is made to effectuate a gift from the testator to the devisee. It may be also the satisfaction of a claim legally presented. It may, on the other hand, be made to a creditor who does not wish to receive it, but prefers to let the debt remain on interest, and rely on his collateral security for its ultimate discharge.

The residuary devise and bequest was of what might remain "after the payment of my said debts and funeral expenses, and the preceding legacies and devise." This language charged on the residuary real estate all debts which the personal estate was insufficient to satisfy. Enough of the residuary real estate must therefore be sold to discharge the mortgage on the "Geer house." That on the store building should be satisfied in the same way, unless the residuary devisees otherwise agree.

Section 556 of the General Statutes which provides that when any estate devised shall be taken for payment of debts, a contribution shall be due from the other legatees or devisees, applies only when the will is silent, or its intent uncertain. Here the estate taken is residuary estate, and the testator required the debts to be paid before the residue was formed.

The superior court is advised that it is the duty of the plaintiff to pay the mortgage on the "Geer house," and, if requested by any of the residuary devisees, that on the store building; and that the requisite funds should be raised by sale of so much as may be necessary of the residuary real estate. In this opinion the other Judges concurred.[38]

[38] In Bulkley v. Seymour, 74 Conn. 459, 51 Atl. 125, 92 Am. St. Rep. 229 (1902), lands subject to a mortgage placed thereon by testatrix were specifically devised without mention of the mortgage, and it was held that, as no contrary intention appeared in the will, the land passed to the devisees exonerated from the mortgage debt. So of lands mortgaged after the execution of the will. Jackson v. Bevins, 74 Conn. 96, 49 Atl. 899 (1901). In Jacobs v. Button, 79 Conn. 360, 65 Atl. 150 (1906), the testator devised mortgaged property and then quitclaimed the land to the devisee, and it was held that the conveyance did not deprive the devisee of the right to have the mortgage discharged by the estate. In the view of the court the devise was one of the property freed from the mortgage and a conveyance subject to the mortgage was not, therefore, a total ademption. But compare Rice v. Rice (Iowa) 119 N. W. 714 (1909), where a devise of land "free from any lien or indebtedness whatever" was held adeemed by a conveyance of the property by the testator to the devisee, although the conveyance was subject to the wife's statutory dower interest. The court, however, gave as a reason that "the widow's statutory interest is not an incumbrance or lien in the ordinary sense in which the words are used, nor as they were understood by the testator." 119 N. W., at page 716.

SECTION 5.—RESIDUARY DEVISES AND BEQUESTS[39]

TINDALL'S EX'RS v. TINDALL.

(Court of Errors and Appeals of New Jersey, 1873. 24 N. J. Eq. 512.)

Bill in chancery by William Tindall against John Manning and Edward Paxton, executors, etc., of Aaron Tindall, deceased, for one eighth part of the sum of $5,000, a lapsed legacy to testator's wife. Testator, after the above bequest to his wife, and several other legacies, bequeathed as follows: "I give and bequeath whatever of my property shall remain after payment of the above, and due settlement of all my business, to my two friends, John H. Manning and Edward Paxton." He appointed Manning and Paxton executors. Testator left no issue, but had eight brothers and sisters. Two of these (of whom the complainant is one) survived him. The other six died before him. All left children living at the death of the testator. The defendant Paxton is one of these children. The case was argued before the chancellor upon bill and answer, who found for plaintiff, and defendants appealed.

DALRIMPLE, J. The question in this case is whether a certain lapsed legacy of $5,000, given in and by the will of Aaron Tindall, deceased, falls into the residuum of the estate and goes to the residuary legatees, or remains undisposed of, and is to be distributed among the next of kin of the testator. The will, after directing the payment of debts and funeral expenses, and the sale and disposition of all testator's property, real and personal, which he might own at the time of his decease, and the collection of the moneys due him, gives to his wife, Ann, in lieu of her right of dower at common law, the said legacy of $5,000. After certain general legacies and bequests, the residuum of the estate is disposed of as follows: "I give and bequeath whatever of my property shall remain after payment of the above, and due settlement of all my business, to my two friends, John H. Manning, to him, his heirs and assigns, and to Edward Paxton, to him, his heirs and assigns." The residuary legatees are appointed executors. The testator having survived his wife, the legacy of $5,000 to her lapsed. This suit is brought by one of the next of kin of the testator, to recover a share of the legacy which has thus lapsed, and his right to recover is put upon the ground that, as to the $5,000 in question, the testator died intestate.

The rule applicable to the question to be solved, as stated in the textbooks, as well as in many adjudged cases, is that the residuary legatee

[39] On the abatement of residuary devises and bequests, see note 12 to Armstrong's Appeal, ante, p. 659.

is entitled as well to a residue caused by a lapsed legacy, or an invalid or illegal disposition, as to what remains after payment of debts and legacies. The only exception to the rule is that, where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention, as gathered from the whole will, must not be defeated. Or the rule embracing the exception, as stated in some of the books, is that the residuary legatee must be a legatee of the residue generally, and not partially so only. The rule is so firmly established that citation of authority in its support is hardly necessary. I will, however, refer to the following text-books and adjudged cases: 2 Rop. Leg. 1672; 2 Williams, Ex'rs, 1313; Easum v. Appleford, 5 Mylne & C. 56; King v. Woodhull, 3 Edw. Ch. (N. Y.) 86; James v. James, 4 Paige (N. Y.) 117; Banks v. Phelan, 4 Barb. (N. Y.) 90; Cambridge v. Rous, 8 Ves. 25; 2 Redf. Wills, 442.

The learned chancellor, in the court below, held that the case now before us came within the exception to the general rule, because the estate given was that which should remain after payment of the legacies before given. But I cannot see that this form of expression in any wise limits or restricts the extent of the gift. The clause would have had precisely the same meaning and effect if it had been, in terms, of the residue of the estate. All that the testator could give to his residuary legatees was what remained of his estate after payment of his particular debts and legacies. The legal effect is precisely the same, whether the one form or the other is adopted.

The chancellor bases his opinion upon what he conceives to be the rule as laid down in 2 Williams, Ex'rs, p. 1315, and in 2 Rop. Leg. pp. 1679, 1682. He also cites the case of Attorney General v. Johnstone, Amb. 577. Exactly what Mr. Williams states the true rule to be is as follows: "The testator may, by the terms of the bequest, narrow the title of the residuary legatee, so as to exclude him from lapsed legacies; as when it appears to be the intention of the testator that the residuary legatee should have only what remained after the payment of the legacies." Mr. Roper states the exception to the general rule in the following language: "When the legatee is not generally, but only partially, residuary legatee, he will not, in that character, be entitled to any benefit from lapses, though very special words are required to take a bequest of the residue out of the general rule; as, first, when it appears the testator intended the residuary legatee should have only what remained after the payment of legacies."

If these authors intend to say (which, to my mind, is by no means clear) that when the clause of the will giving the residuum of the estate contains, or has annexed to it, the words, "after payment of debts and legacies," the settled rule of construction is that lapsed legacies are not embraced, but that as to them the testator is to be held as having died intestate, I cannot yield my assent to the proposition. The

cases cited by the authors referred to do not support such a doctrine, while there are several well-considered cases to the contrary.

Vice Chancellor Wood, in the case of Bernard v. Minshull, Johns. Eng. Ch. 276, 299, says: "All you have to consider is whether the property is excepted, in order to take it away, under all circumstances and for all purposes, from the person to whom the rest of the property is given, or whether it is excepted merely for the purpose of giving it to some one else. If the latter, and the gift to some one else fails, the donees of all except this property are entitled to take the whole." In Roberts v. Cooke, 16 Ves. 451, it was held that a general disposition of personal estate, not thereinbefore specifically disposed of, comprehended specific legacies lapsed; the word "specifically" being held to mean "particularly." In the case of King v. Woodhull, 3 Edw. Ch. (N. Y.) 79, 84, the form of the bequest was: "The residue and remainder of my estate, if any there shall be, after the payment of the said $1,000 to the missionary society, I give and bequeath to the children of my niece." And it was held broad enough to embrace as well the legacy to the missionary society, which it was claimed was void, as a bequest to a mission school, which was held to be ineffectual. Vice Chancellor McCoun in his opinion in that case says: "The words, 'after payment of debts and legacies,' or after payment of legacies specified or recapitulated in the residuary clause itself, are not restrictive of the bequest to any particular or partial residue; but the bequest, after all, is general of the remainder, and may be so understood without doing violence to the expressions of the will. Where the residuary clause is thus worded, the legatee is as much a general legatee of the residuum of the estate as if such words were not used." In Shanley v. Baker, 4 Ves. 732, the words were, all the rest and residue of my estate and effects "not by me hereinbefore particularly disposed of;" and they were held to embrace a leasehold property given as a legacy, which, by the statutes of mortmain, was void. To the same effect is the case of Brown v. Higgs, 4 Ves. 709. The case of Attorney General v. Johnstone, Amb. 577, was not decided upon the ground that the residuary bequest contained words of import similar to those now under consideration, for it did not; but the conclusion reached in that case was that, from the whole context of the will, it was evident that the testator did not intend that the void legacy should, in any event, become a part of the residuum of his estate. The syllabus of the case, which very well shows the point decided, is: "Residue, under particular circumstances, will not take in lapsed legacies;" the residue being given as a small remainder of about £100, and the lapsed legacies amounting to £20,000.

I have not been able to see anything in the residuary clause, when taken by itself, or in the context of this will now before us, which will authorize the result sought by the complainant. It seems to me quite evident that the testator did not intend to die intestate as to any part of his property. He gave the legacy of $5,000 to his wife, to be accepted

at her option, in lieu of her right of dower in his estate. If she should decline to accept it on these terms, or if, by reason of her death in the lifetime of her husband, it lapsed, the will of the testator, as ascertained from the well-settled meaning of the words he has used, was that the lapsed or rejected legacy should go into and form part of the residue of his estate.

For the reasons above stated, the decree below must be reversed, and the complainant's bill dismissed, but without costs in this court or the court below.[40]

DOE ex dem. FERGUSON et al. v. HEDGES et al.

McKNIGHT'S LESSEE et al. v. SAME.

(Superior Court of Delaware, 1835. 1 Har. 524.)

CLAYTON, C. J.[41] Mary James being seised in fee of the premises in question by her will duly executed, dated 30th July, 1831, gave and devised to "Saint Andrew's Church in Wilmington, all a certain lot of land therein described, to have and to hold the use of the said house and lot to the said church forever; but not to be sold on any account whatever." And after bequeathing sundry legacies, there is this clause in her will: "Item, I give, bequeath and devise to William Ball and Mary Ball, children of James Ball, deceased; and to John McKnight all the residue of my estate real and personal of whatever kind it may be." The lessors of the plaintiff are the residuary devisees.

It is not contended in this case that the devise to Saint Andrew's Church, passes any estate in the premises in question to the church; but it is admitted that the devise is void by the laws of this state. That question was decided at the last May Term in Kent, in State, Use of Wiltbank et al., v. Bates. The question here is, who take? the heirs at law of Mrs. James, or her residuary devisees?

Since the case of Doe, on the Demise of Morris, v. Underdown, Willes, 293, that question seems to be completely settled in England. In that case the distinction, as far as we can ascertain, was first established between a lapsed devise, and a void devise. The principles laid down by the Chief Justice in that case were these: that the intent of the testator ought always to be taken as things stood at the making of his will, and is not to be collected from subsequent accidents which the testator could not then foresee; and that when a testator in his will has given away all his estate and interest in certain lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give anything in these lands to the residuary devisee. This latter rule would govern all cases of lapsed devises; for if the

[40] On residuary clauses, see 4 Prob. Rep. Ann. 491, note.

[41] The statement of facts is omitted.

testator were to die immediately upon the making of the will there would be nothing undisposed of, and the devisee would take; but if the devisee were to die between the making of the will, and the death of the testator, the devise would lapse and the heir at law would necessarily take in preference to the residuary devisee, for it was not undisposed of at the making of the will, but the devise was rendered inoperative by a subsequent accident—the death of the devisee. This is not so in the case of a void devise; for there at the making of the will nothing passes, nothing is disposed of, and the residuary devisee under the clause "all the residue of my estate" takes, and not the heir at law. In Doe, Lessee of Stewart, v. Sheffield, 13 East, 526, this is considered as the settled law; and in Doe, on the Demise of Wells and Others, v. Scott and Another, 3 Maule & Sel. 300, Lord Ellenborough in delivering the judgment of the court recognizes the authority of the two preceding cases as "admitted law" on the subject.

We are not unaware of the American decisions on this subject in 6 Conn. 293, 16 Am. Dec. 58,[42] and in Lingan v. Carroll, 3 Har. & McH. (Md.) 333; but we prefer following the authorities which we have cited. The heirs at law do not appear to have been objects of the testator's bounty; they are nowhere mentioned in her will. This circumstance is not relied on in forming our judgment, but merely to show that the testatrix did not desire that her heirs at law should derive any benefit from her estate. Our decision is founded upon the authorities which we have cited, and upon the principles established by them. Our opinion is therefore for the residuary devisees, and judgment is accordingly given for the plaintiffs in the case of the Lessee of McKnight and Others v. Hedges; and in the other case, lessee of J. Ferguson and others, the heirs at law of Mary James, against the same defendant, that judgment be given for the defendant.[43]

BLIGHT v. HARTNOLL.

(Supreme Court of Judicature, Court of Appeal, 1883. L. R. 23 Ch. Div. 218.)

JESSEL, M. R.[44] It is well to see what the law is upon this subject before we attempt to construe this will. I take it that the law as to residuary personalty is now substantially the same as the law relating to real estate, with respect to which the statute 1 Vict. c. 26, § 25,

[42] Greene v. Dennis. But see Giddings v. Giddings, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192 (1894).

[43] Under modern statutes the heirs do not take void devises, any more than lapsed, if the residuary clause is broad enough to embrace them. Patterson v. Swallow, 44 Pa. 487 (1863); Gallavan v. Gallavan, 57 App. Div. 320, 68 N. Y. Supp. 30 (1901). See section XXV of the Wills Act in the Appendix, post, p. 765.

[44] The statement of facts, the concurring opinion of Lindley, L. J., and the opinion of Fry, J., in the court below are omitted. Fry, J., decided that the wharf fell into the residue.

enacts that unless a contrary intention shall appear by the will such real estate or interest as is comprised in any devise which shall fail or be void by reason of the death of the devisee in the lifetime of the testator or by reason of the devise being contrary to law shall be included in the residuary bequest. If that be so, the first question is whether the bequest in this case is a residuary bequest, for if it is the void gift must prima facie fall into it. You may have a residuary bequest in various forms; the same thing may be meant though not expressed in the same words. But however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will. It is not a true residue if there is some part not disposed of by the will to anybody at all. There is a difference between a part of the estate being undisposed of and a part being unduly disposed of. When I say a residue I mean the residue of the estate not professed to be otherwise disposed of by the will. If any part is not professed to be disposed of at all by the will there is no true residuary gift. The wording is not material. If a man says, "I give all my personal estate except my gold watch, which I give to A., and my leasehold house, which I give to B.," that is a true residuary gift. The common form no doubt is to begin with a bequest of legacies to A., B., and C., and then to give the residue to D. But it means the same thing. Evans v. Jones, 2 Coll. 516, is an authority for that, if one is wanted. But it is very different if a testator gives everything to A. except his gold watch and his leasehold estate and does not give them to anybody else. In that case there is not a lapse or void gift of the watch and leasehold estates, they are not legacies at all, but they go to the next of kin, and there is no true residuary gift. But the moment we get a true residue the law is that the residue is increased by the lapse of a legacy or by the fact that it has not been effectually given away in accordance with the expression of the testator's intention.

Here the residuary gift is as simple as possible. The testatrix gives to Christiana Hartnoll all her personal property except a certain wharf, and that wharf is expressed, to be given away to other persons, but is not validly given away, some of the limitations being void for remoteness. Why should not this wharf fall into the residue? It is said that there is a contrary intention shewn, because the will makes the wharf subject to certain debts which are charged on it. But it is only made subject to the debts if the legacy takes effect; there is nothing charged on it if the legacy does not take effect. It appears to me very difficult to suppose that a testator should intend that a legacy which fails from being void should not go into the residue. Unless you find express words shewing that the testator doubted whether a bequest in his will was void or not, it is impossible to suppose that he contemplated what would happen if the bequest was invalid. It is different from the case of lapse, for every testator knows that there is a possibility of a legatee dying before him, although of

course he presumes that the legatee will survive him. The only case which I can conceive of is where a testator doubts whether charities to which he wishes to make bequests are capable of taking them; in that case he may put into his will a string of illegal bequests, but we cannot assume that he knew them to be illegal. It is almost impossible to imply a direction that if a legacy should fail, as for example for remoteness, it should not fall into the residue. There is nothing in the present case to lead one to suppose that the testatrix thought the gift would be void, or intended that if it was it should not fall into the residue. Therefore in my opinion the decision of Mr. Justice Fry was correct.

As regards Wainman v. Field, Kay, 507, as I have before observed, the Vice Chancellor came to the conclusion that there was no true residue, and therefore the property in question did not fall into the residue. That decision is merely one of construction, and I do not think that I should have come to the same conclusion on the construction of the will in that case, but that is not material. There is no principle laid down, and I cannot extract any principle from the decision. Therefore whether I concurred in the construction or not that authority has no application to this case.

MOLINEAUX v. RAYNOLDS.

(Court of Chancery of New Jersey, 1896. 55 N. J. Eq. 187, 36 Atl. 276.)

REED, V. C.[45] * * * Charles T. Raynolds died, leaving a will by which he left of this property thirty-six hundredths to his son Edward H., thirty-two hundredths to his son Charles T., and thirty-two hundredths to Edward H., as trustee for his son William W. His son Charles T. died before his father, and the question is whether his share passed to Mrs. Adelaide Raynolds under the residuary clause of the will, or whether it was undisposed of by the will, and so passed to the two sons as heirs at law of their father.

The two sons, in their own right, make no claim to any interest in their deceased brother's share, but the wives of the two sons claim an inchoate right of dower in the same, grounded upon what they claim to be the legal estate of their respective husbands as heirs at law. Mary S. is the wife of Edward H., and Mattie C. is the wife of William W. Raynolds. At common law, whenever a devise lapsed by the death of the devisee, before the death of the testator, the property passed to the heirs at law, while lapsed legacies, instead of passing to the next of kin, fell in the residuum, and so passed, under a will, to the residuary legatees. This distinction between the course taken, under the same condition of affairs, by lapsed devises and lapsed legacies, seems to have sprung from the fact that no real estate acquired by

[45] Part only of the opinion is given.

the testator, after the execution of his will, passed under the residuary clause, while such a clause included all personal property owned by the testator at the time of his death not otherwise given, no matter when acquired.

Now, by our statute of wills, these instruments become operative upon real property acquired after, as well as before, the date of the execution of the will. Rev. p. 1248. By this act devises and legacies are put upon the same footing, and it would seem that inasmuch as the residuary clause carries all the personalty left undisposed of by other parts of the will, the same should naturally be its effect in regard to realty. Similar statutes in other states have been judicially declared to extinguish all difference between lapsed legacies and lapsed devises, in this particular, and that both pass into the residuum in default of a contrary intention manifested on the face of the will.

This is the law of this state. In Executors of Shreve v. Shreve, 10 N. J. Eq. 385, Chancellor Williamson suggests the query whether the statute did not abolish the distinction between real and personal property in the particular mentioned; and in Smith v. Curtis, 29 N. J. Law, 345, it was expressly held by the supreme court that the rule upon which the distinction between lapsed legacies and lapsed devises had arisen should not be kept up, as the reason upon which the rule rested had been removed. It was held, in that case, that a lapsed devise passed into the residuum.

Under the doctrine laid down in this case, the share of Charles T. passed to Mrs. Adelaide Raynolds under the residuary clause of the will. * * * My conclusion is that the share of Charles T. Raynolds fell into the residue and was devised to Adelaide E. Raynolds.[46]

In re ISAAC.

HARRISON v. ISAAC.

(Supreme Court of Judicature, Chancery Division. [1905] 1 Ch. 427.)

The will of Joseph Isaac, after giving certain pecuniary legacies, directed that "the remainder" of testator's property be divided among certain designated nephews and nieces. The will ended: "And I appoint my executor my residuary legatee." Two of the pecuniary leg-

[46] See Drew v. Wakefield, 54 Me. 291, 296, 297 (1866); Cruickshank v. Home for the Friendless, 113 N. Y. 337, 21 N. W. 64, 4 L. R. A. 140 (1889). But see Rizer v. Perry, 58 Md. 112 (1881).

A renunciation by the specific devisee will take place by relation back, so as to give the property to the residuary devisee or other person next entitled, it seems. Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (N. S.) 595 (1908). In that case the devisee had only a life estate, and the renunciation became effective by relation, so as to vest title in the remainderman as of the date of the will and to render nugatory an execution levy by a judgment creditor of the devisee for life.

atees predeceased the testator, and the executor took out an originating summons. Two of the questions raised were: (1) Whether the appointment of the plaintiff as residuary legatee operated to revoke or defeat the previous bequest of the remainder of the testator's property to the defendants? (2) Whether by the lapse of the two pecuniary legacies, owing to the deaths of the legatees in the testator's lifetime, the same "remainder" was increased by the amount of the lapsed legacies, or passed to the plaintiff as residuary legatee?

The summons was heard on February 4, 1905, by Buckley, J., who decided that the appointment of the plaintiff as residuary legatee did not revoke the previous bequest of the "remainder."

The second question was then argued.

BUCKLEY, J.[47] I have already held in answer to the first question that the appointment of the executor as residuary legatee does not defeat or revoke the previous gift of the remainder of the testator's property. It remains for me to determine what is the destination of the legacies which have lapsed by the deaths of the two legatees in the lifetime of the testator.

Now if the will had not contained these last words appointing the executor residuary legatee, it seems to me that the words "the remainder of my property shall pass," etc., would have constituted a perfectly good residuary bequest. But the will does contain the words I have mentioned. Does that fact alter the construction which I have placed on the first residuary gift? I do not think it does, unless the effect be to reduce the earlier words to silence. Is it possible, without doing this, to give a proper effect to the later words? In my judgment it is, because if the prior gift of one or more of the shares of "the remainder" were to fail, owing to a lapse by the death of the legatee in the lifetime of the testator, the subsequent disposition appointing a residuary legatee would take effect. If some person entitled to a share of the remainder died in the lifetime of the testator, there would be a lapse of a part of the first disposed of residue, and under the second disposition the residuary legatee would take something.

The testator makes certain gifts, and provides that "the remainder of my property shall pass as follows." I think that means that, subject to providing for such of the previous gifts in the will as take effect, the remainder of the property shall pass in the manner indicated. In other words, the prior gift is a residuary bequest. Then there is another residuary gift to which effect can be given by holding it to mean that, if any of "the remainder" of the property is undisposed of, anything to be swept up is to belong to the executor, who is to take it beneficially. It does not seem to me that there is any authority exactly in point. The nearest case is that of In re Jessop, 11 Ir. Ch. Rep. 424, where it appears to have been assumed that lapsed

[47] The statement of facts is rewritten and abbreviated.

legacies would enure for the benefit of the second residuary legatee. The gifts of residue there were, the first to A. and the second to A. and B. It was unreasonable to suppose that a legacy lapsing by the death of A. could be intended to fall into residue for the benefit of A. herself and another. This being so, there was nothing that the second residuary legatee could take other than legacies which were given in priority to both residuary gifts and which lapsed.

That is not the case here. I think that the lapsed legacies in the present case fall into the first gift of residue.[48]

MORISEY v. BROWN.

(Supreme Court of North Carolina, 1907. 144 N. C. 154, 56 S. E. 704.)

See ante, p. 671, for a report of the case.

DRESEL v. KING et al.

(Supreme Judicial Court of Massachusetts, Worcester, 1908. 198 Mass. 546, 85 N. E. 77, 126 Am. St. Rep. 459.)

KNOWLTON, C. J. This is a bill brought by an administrator with the will annexed, for instructions as to the meaning of the will. The fourteenth clause of the will is as follows: "I direct my executor, hereinafter named, to convert all the rest and residue of my estate into cash and to divide the same among the pecuniary legatees hereinbefore named, in proportion to their several pecuniary legacies; but should my estate not herein specifically devised be insufficient to pay all my debts, charges of administration and the pecuniary legacies herein given, said pecuniary legacies are to be proportionally abated."

One of the pecuniary legatees, to whom $10,000 was given by the will, died before the testatrix, leaving no issue. Her legacy, therefore, lapsed, and the first question argued is whether it fell into the residuum, or passed to the next of kin of the testatrix.

We think that the residuary clause had the distinguishing characteristics of a true residuary clause, which indicates a purpose of the testator thereby to include all his estate that is not actually disposed of in other parts of his will, and thus to make a complete disposition of all his property. We think it plain that this lapsed legacy is to be disposed of under the residuary clause.

The most difficult question in the case is whether the gifts in this clause are to the pecuniary legatees as a class, so that on the death of one of them the whole amount goes to the survivors, or whether they are gifts to them as individuals, to hold as tenants in common in the

[48] Compare Ward v. Stanard, 82 App. Div. 386, 81 N. Y. Supp. 906 (1903).

proportions specified. The legatees are not mentioned by name, but their identity as individuals is plainly shown. They are not in the ordinary sense members of a distinct class, for they have no relation to one another except as recipients of the testatrix's bounty. One of them is a corporation, and most of them are not relatives of the testatrix or of one another.

We are of opinion that the clause should be construed as if they were severally mentioned by name, to receive each a share in the proportion specified. If this is the meaning, under the rule stated in Jackson v. Roberts, 14 Gray, 546, the gift to any one of them who died before the testatrix would lapse. Such a result was reached in Sohier v. Inches, 12 Gray, 385, Lombard v. Boyden, 5 Allen, 249, Cummings v. Bramhall, 120 Mass. 552, Frost v. Courtis, 167 Mass. 251, 45 N. E. 687, and Lyman v. Coolidge, 176 Mass. 7, 56 N. E. 831. The strongest case cited for the pecuniary legatees on this point is Prescott v. Prescott, 7 Metc. 141, but the language of the will in that case was much less specific, as pointing to the individuals and to distinct proportions, than it is in this. We are of opinion that the present residuary clause should be treated as if it mentioned the legatees by name, and gave his proportional share in terms to each.

In this view, the share that was given to Annette M. Alden, which was $^{20}/_{253}$ of the entire residue, lapsed, and passed to the next of kin as property undisposed of by the will.

It is contended that this share goes to the other residuary legatees. But as to this share, which is a part of the residuum, they are not residuary legatees. In Lyman v. Coolidge, 176 Mass. 7–9, 56 N. E. 831, 832, this court said: "But where a legacy lapses, which is a part of the residue, it cannot, according to our decisions, fall into the residue, because it is itself a part of the residue, and it must pass as intestate estate." This rule was also stated and applied in Sohier v. Inches, 12 Gray, 385, Lombard v. Boyden, 5 Allen, 249, Frost v. Courtis, 167 Mass. 251, 45 N. E. 687, Powers v. Codwise, 172 Mass. 425, 52 N. E. 525, and Best v. Berry, 189 Mass. 510, 75 N. E. 743, 109 Am. St. Rep. 651. It prevails in other jurisdictions. Kerr v. Dougherty, 79 N. Y. 327, 346, 349; Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; Humble v. Shore, 7 Hare, 247; Bagwell v. Dry, 1 P. Wms. 700.

It follows that the proportional part of the residuum which would have gone to Annette M. Alden if she had survived the testatrix will be divided among the next of kin. So ordered.[49]

[49] In In Re Dunster, [1909] 1 Ch. 103, 105, 106, Neville, J., says: "There is a well-known rule that where residue is given to tenants in common and one of the tenants in common dies in the testator's lifetime, the lapsed share does not go as an accretion to the gift to the other tenants in common, but it is held that there is an intestacy and the share goes among the next of kin. That is, there can be no residue of a residue. The arguments by which this rule was arrived at are perfectly intelligible, and, one may say, plausible. Nevertheless, I think that the effect of it is to defeat the testator's intention in almost

SECTION 6.—ADVANCEMENTS AND THE ADEMPTION AND SATISFACTION OF LEGACIES AND DEVISES [50]

GRATTAN v. GRATTAN.

(Supreme Court of Illinois, 1856. 18 Ill. 167.)

SKINNER, J.[51] This was a bill in equity for distribution of an intestate's estate. The bill alleges that, in 1852, Silas Grattan died intestate, leaving the complainant, Azariah B. and Philip D. B. Grattan, his children, and sole heirs at law, and Elizabeth Grattan, his widow,

every case in which it is applied; but it is a rule by which I am undoubtedly bound. That rule has been held to apply in cases where the gift is to named persons but not to apply in cases where the gift is to a 'class.'"

Where the residue was given to five people, and the gift to one was revoked by a codicil, it was held that his fifth went to the next of kin, and not to the other residuary legatees. Waln's Estate, Vaux's Appeal, 156 Pa. 194, 27 Atl. 59 (1893). So where the gift to one lapsed. Gorga's Estate, Robinson's Appeal, 166 Pa. 269, 31 Atl. 86 (1895).

"It is true as a general rule that a testator is not presumed to bestow his bounty upon persons other than those who survive him, unless his intent to the contrary is evident. Where it appears, however, that a bequest or devise by will was made to discharge a duty or obligation resting upon the testator, this, in effect, will preclude a lapse of the bequest, although the legatee may die during the life time of the testator. For instance, the rule is well settled that a legacy or bequest made in payment of a debt does not lapse by the death of the legatee prior to that of the testator. This rule has been affirmed by the authorities where the debt or debts were barred by the statute of limitations at the time the testator executed his will. 2 Redfield, Wills (3d Ed.) 161; Williamson v. Naylor, 3 Yon. & Coll. Ex. 208; Turner v. Martin, 7 De G., M. & G. 429; Phillips v. Phillips, 3 Hare, 281; Ward v. Bush, 59 N. J. Eq. 144 [45 Atl. 534]." Jordan, J., in Ballard v. Camplin, 161 Ind. 16, 21, 22, 67 N. E. 505, 507 (1903). See, also, Stevens v. King, [1904] 2 Ch. 30. On statutes to prevent lapses, see 2 L. R. A. (N. S.) 580, note.

[50] "While the term 'advancement' is generally used in cases of intestacy, the term is also used as applicable to cases of wills. Where in either event the intention is clear that the sums advanced should be deducted from the amounts due the devisee under a will, or heir in case of intestacy, that intention must prevail." Grant, J., in In re Bresler's Estate, 155 Mich. 567, at page 575, 119 N. W. 1104, at page 1107. On advancements to heirs, see 12 L. R. A. 566, note.

"A legacy is, strictly speaking, adeemed (from adimere, to take away) when the thing given has, by some act of the testator, ceased to exist in the form in which it is described in the will, so that on his death there is nothing answering the description of the legacy to be given to the legatee. * * * A similar result follows where the testator performs the function of an executor, by giving during his lifetime what he intended the legatee to have by his will, thereby satisfying the legacy himself, leaving nothing for the executor to do in respect of such legacy. The distinction between the ademption and satisfaction of legacies seems clear enough, but it is not generally observed; the term 'ademption' being applied indiscriminately to cases where the legacy is cut off by the destruction or alteration of the subject, and where it is satisfied by the delivery of the subject to the legatee during the testator's lifetime." 2 Woerner's American Law of Administration (2d Ed.) 973, § 446. On the ademption of legacies, see 95 Am. St. Rep. 342, note.

[51] The statement of facts is omitted.

him surviving, and seised of certain real estate in this state which descended to said heirs, and possessed of certain personal estate which remains for distribution among them; that said Silas, in his lifetime, conveyed and caused to be conveyed to said Azariah and to said Philip respectively, by way of advancements, and with the intention of providing for the complainant out of the remainder of his estate, certain real estate; that said Azariah and said Philip, at the time of making said advancements, were, and still are, infants, and that said Silas died without providing for complainant; that one Binckley is administrator of the estate of said Silas, and has in his hands said personal estate for distribution.

The bill makes said Azariah, Philip and Elizabeth, and said Binckley, defendants, and prays that said Azariah and Philip be compelled to bring into hotchpot with the estate of said Silas their respective advancements, or be barred from participating as heirs in the said estate. Upon the hearing the court dismissed the complainant's bill.

Without referring to the evidence, which appears sufficient to entitle the complainant to a decree, if the facts alleged entitle him to equitable relief, we proceed to examine the legal and equitable questions involved.

Our statute provides that, "where any of the children of a person dying intestate, or their issue, shall have received from such intestate, in his lifetime, any real or personal estate, by way of advancement, and shall desire to come into the partition or distribution of such estate with the other parceners or distributees, such advancement, both of real and personal estate, shall be brought into hotchpot with the whole estate, real and personal, of such intestate; and every person so returning such advancement, as aforesaid shall thereupon be entitled to his or her just proportion of said estate." St. 1856, p. 1201.

This provision is in harmony with the ancient customs of certain localities, and with the common law generally of England, with regard to lands descended in coparcenary, existing at the time of the settlement of the American colonies, and with the subsequent statute of distributions of 22 and 23 Charles the Second. Bacon's Abr. title "Coparceners," E.; Id. title "Uses and Trusts," D; Id. title "Executors and Administrators," K; Williams on Ex'rs, 907; Id. 916 to 924; 2 Kent's Com. 420, 421, and 422.

The principle of the English statute is equality of distribution of the ancestor's personal estate among his children and their descendants; and such is the object and purpose of our statute, including both the real and personal estate of the ancestor.

An advancement is the giving by the intestate, in his lifetime, by anticipation, the whole or a part of what it is supposed the donee will be entitled to on the death of the party making it. And according to the decisions under the English and similar American statutes, the ancestor must have died intestate; the gift must have been made in his lifetime, and completely executed on his part, with the intention that the same should be the child's portion of his estate, or a part

of such portion; the gift to the child or heir, made in the lifetime of the intestate ancestor, is prima facie an advancement, and is to be treated, in case the party to whom the advancement was made comes in for his distributive share with his coheirs, as a debt due from him to the estate, and may be deducted out of his share of the entire estate so brought together, if such share be sufficient for that purpose; the widow takes her share of the personal estate, and, of course, her dower in the lands, without regard to advancements, and the balance only, after deducting the widow's share, is treated as estate for distribution; the child advanced or provided for will be entitled to participate with his coheirs in the estate for distribution only upon bringing in what he has received by way of advancement, and taking, with them, of the whole estate so united, his equal portion; and the property or money advanced need not be returned in specie or kind, but is to be estimated according to its value at the time the advancement was made, and the heir so advanced and coming in will be entitled to his equal share of the whole, deducting the value of the advancement. 2 P. Williams, 440; Bacon's Abr. title "Executors and Administrators," K; Id. title "Uses and Trusts," D; Williams on Ex'rs, pp. 916 to 924; 2 Story's Eq. Juris. §§ 1202 to 1206; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Bemis v. Stearns, 16 Mass. 200; Osgood v. Reed, 17 Mass. 356; Elliot v. Collier, 1 Ves. 16; 3 Atk. 259; 8 Ves. 55; Stearns v. Stearns, 1 Pick. (Mass.) 157.

These rules, adopted by the courts in the construction and enforcement of a statute subsequently substantially incorporated into our law by legislative enactment, and consistent with the evident spirit and policy of the latter statute, are presumed to have been in the mind of the Legislature at the time of its adoption, and control its construction. Campbell v. Quinlin, 3 Scam. 289; Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419.

The heir advanced may, if he choose, retain what he has received, but if he does he must be content, and relinquish all claim of participation with his coheirs in the distribution or partition of the ancestor's estate.

Necessarily, therefore, it is for him to elect whether he will retain what has been advanced to him, and relinquish all right in the estate descended and for distribution, or will return or account for the advancement, and take of the entire estate commingled, equally with the other heirs.

Infants, for want of legal capacity, cannot exercise this power and right of election, and these infant defendants must be excluded from partaking in the distribution in this case, or the estate must remain in the hands of the administrator until they arrive at full age, unless equity will interpose, and, upon ascertaining what would be most beneficial for them under the facts, exercise for them this power.

A party entitled to one only of several things, at his election, where other rights are involved, must exercise such right of election in a

reasonable time, and if he does not, or cannot for want of legal capacity, in favor of other parties in interest, equity will do it for him, or bar him from a future exercise of the right. 2 Story's Eq. Jurisp. c. 30.

Courts of equity have a paramount jurisdiction in cases of administration and the settlement of estates, and may control courts of law in their action in the settlement and distribution of estates. 1 Story's Eq. Jurisp. c. 9; Williams on Ex'rs, pp. 1239, 1240; Lynch v. Rotan, 39 Ill. 19; Freeland v. Dazey, 25 Ill. 296; Townsend v. Radcliffe (decided June term, 1867) 44 Ill. 446.

They have, also, a similar and plenary jurisdiction over the persons and estates of infants, and will, in the exercise of that jurisdiction, cause to be done whatever may be necessary to preserve their estates and protect their interests. 2 Story's Eq. Jurisp. c. 35; Cowls v. Cowls, 3 Gilman, 435, 44 Am. Dec. 708. In this case, if the value of the advancements respectively does not exceed the share of the heir in the whole personal estate for distribution among the heirs, including the advancements, and the court upon a further hearing shall find it beneficial to the infant defendants to take their distributive shares and portions of the entire estate, instead of retaining their respective advancements, it will not be necessary to touch the real estate descended, but the advancement may be deducted from the share of the party to whom it was made; otherwise, in order to do complete equity to all, it may be necessary to make partition of such real estate, after disposing of the personal estate, according to the rights of the parties; and for that purpose it may, perhaps, be necessary for the complainant to amend his bill.

Decree reversed and cause remanded. Decree reversed.[52]

[52] "Hotchpot is the bringing into the estate of an intestate an estimate of the value of advancements made by the intestate to his or her children, in order that the whole may be divided in accordance with the statute of descents. Where those who have received advancements decline to bring the same into hotchpot when legally required to do so, they may in proper proceedings be excluded from participation in the division of the property of the intestate under the statute of descents." Whitefield, C. J., in Lindsley v. McIver, 57 Fla. 466, 48 South. 628 (1909).

On bringing into hotchpot, see 80 Am. Dec. 565, note. A child bringing an advancement into hotchpot should be charged with its value "without interest, the general rule being, as is well settled, that advancements do not bear interest." Cardwell, J., in McCoy v. McCoy, 105 Va. 829, 840, 54 S. E. 995, 999 (1906). That collateral kindred do not have to bring into hotchpot property given them is held in Johnson v. Antriken, 205 Mo. 244, 103 S. W. 936 (1907).

In Hackleman v. Hackleman, 199 Ill. 84, 92, 65 N. E. 113, 116 (1902), the court said: "The father in his lifetime, by an arrangement in the nature of a family settlement, designated certain of his real estate as the separate property of each of his three children. The children acquiesced in the arrangement and each of them entered into the actual possession of the lands so allotted to them respectively. Their rights, after the death of the father, ought, in justice and fairness, to be the same as if they had inherited the lands in common and afterwards made, by parol, the same allotment that their father made during his lifetime and in which they each acquiesced. We know of no equitable reason or rule why a decree should not be granted securing to the

ELLIOT v. WILSON et ux.

(Supreme Court of Missouri, 1889. 98 Mo. 379, 11 S. W. 739.)

BLACK, J.[53] Henry Elliot died intestate, leaving a widow and two children, namely, Mary, the wife of John A. Wilson, and Albert Elliot. At the final settlement of the estate there was in the hands of the administrator the sum of $1,794.25. Other sums had been paid by him to the widow and children during the course of the administration. During the lifetime of the deceased he conveyed to his daughter, Mary, 325 acres of land, and the deed contains a recital to the effect that she is to be charged therefor, as an advancement, with the sum of $11,200. The deceased advanced her money and personal property in the further sum of $1,000. He conveyed to his son, Albert, lands by way of an advancement to the amount of $9,205. The deceased left 400 or 500 acres of land, which has been divided between the children and the widow, the latter having elected to take a child's part. Albert filed in the probate court a petition setting up these facts, asking that he and his sister be charged with these advancements in real and personal property, and that the final distribution be made on that basis. The probate court made an order in accordance with the prayer of the petition. * * *

The contention on the part of the plaintiffs in error is that advancements can be brought into hotchpot in the partition of real estate only, whether made in real or personal property, and that the probate court, in ordering the distribution of the personal estate in the hands of the administrator, cannot consider advancements. The subject of advancements is regulated by statute in this and perhaps all of the states of this Union. * * *

Our statute, therefore, must be our guide. It is in these words: "When any of the children of the intestate shall have received, in his lifetime, any real or personal estate by way of advancement, shall choose to come into partition with the other parceners, such advancement shall be brought into hotchpot with the estate descended." Section 2166, Rev. St. 1879. It is argued that an "estate descended" can only mean real estate, as the personal property goes to the administrator, and that the term "parceners" has also a common-law meaning, and applies only to lands descended by inheritance; and it is with these definitions of the terms that the conclusion is reached contended for by plaintiffs in error, namely, that the advancements can only be considered in the partition of the real property descended.

appellant the same relief that would have been given him had he and his brother and sister inherited the lands as co-tenants and made parol partition after the death of their father."

By statute in some states written evidence that a gift is made as an advancement is required. For a construction of such a statute, see Elliott v. Western Coal & M. Co., 243 Ill. 614, 90 N. E. 1104 (1910).

[53] Part only of the opinion is given.

There is a sense in which it may be said the personal property goes to the administrator. He must inventory the same, and such property constitutes the primary fund out of which the debts are paid. But under our law he has no personal interest in the property. He takes for the sole purpose of administration. When the debts are paid, if there is personal property on hand, and it is susceptible of division in kind, it must be "partitioned" by and under the proceeding pointed out in the administration law. Sections 246, 247, Rev. St. 1879. The heirs take this surplus of personal property by virtue of such a partition, without any bill of sale or other transfer from the administrator; so that it is not improper at all to say that personal property descends. But it is useless to discuss definitions of the terms "estate descended," "parcenary," and "partition." The legislature could make its own definitions, and it has done so in clear terms.

The first section of our statute concerning descents and distributions (section 2161) provides that when any person having title to any real or personal estate shall die intestate as to such estate "it shall descend, and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following course." The course of descent is then pointed out, and it is the same as to both real and personal property. And then follows the section before quoted, relating to advancements. It will be seen that personal property, does descend to the heirs, subject only to the payment of the debts and the widow's dower. And so, too, the personal property is distributed in parcenary. In these respects no distinction whatever is made between real and personal property. If a child has been advanced by either real or personal property, or money, his share in the personal and in the real estate must abate by the amount of the advancement. In other words, the children must be made equal, and it matters not whether this equality be brought about in the partition of the real estate or the distribution or partition of the personal property. Cases may arise where it will be necessary to take an account of advancements in the division of both the real and personal property. * * *

We have said that bringing into hotchpot under our statute does not mean that the property or money advanced shall, in kind or specie, be thrown in with the property which has descended, but it is to be estimated and charged against the party according to its value at the time the advancement was made. Ray v. Loper, 65 Mo. 470.[54] The party advanced does not relinquish his title to the particular property

[54] "Property that has been advanced to a distributee will ordinarily be estimated at its value at the time the advancement was made, in the absence of a statute to the contrary. However, if the gift, when made, was revocable or unenforceable, or if the donor remained in the possession and enjoyment of the property, then the value of the property is to be estimated as of the time when the gift became irrevocable or enforceable, or when the donee acquired possession of it, regardless of the time when the actual transfer occurred." 14 Cyc. 177, 178.

by bringing it into hotchpot, but it is brought in for the purpose of being taken into consideration in making the parties equal in the estate. Jackson v. Jackson, 28 Miss. 674, 64 Am. Dec. 114. The court does not deal with the land advanced, but only with the value of it. So far as the jurisdiction of the probate court is concerned, it can, therefore, make no difference whether the advancement was by way of land, money, or specific personal property, for it is with the amount only of the advancement that the court deals. * * *

The power to make distribution includes the power to take account of all matters necessary to be considered in the ascertainment of the shares, and this includes the taking an account of the advancements, whether made by way of real or personal property. Doubtless the parties may be equalized in the partition of real estate, but they may also be made equal in the division of the personal property by the probate court. * * *

The judgment of the Kansas City Court of Appeals is reversed, and the cause is remanded to that court, with directions to affirm the judgment of the circuit court. All concur.[55]

HILTON v. HILTON.

(Supreme Judicial Court of Maine, 1907. 103 Me. 92, 68 Atl. 595.)

See ante, p. 486, for a report of the case.

AMETRANO v. DOWNS.

(Court of Appeals of New York, 1902 170 N. Y. 388, 63 N. E. 340, 58 L. R. A. 719, 88 Am. St. Rep. 671.)

CULLEN, J. On August 7, 1884, Margaret Shelley, now deceased, received by conveyance from her husband through an intermediary an undivided one-half in the premises known as number 22 Oliver street, in the city of New York. On March 12, 1891, she executed the following will:

[55] "The classes of property that are chargeable with advancements depend largely upon the statutes directing descents. In some states advancements of personal estate will first be charged against the personal estate of the intestate to which the donee is otherwise entitled, and advancements of real estate first be charged against his distributive share of the intestate's real estate. If the statute excludes the blending of real and personal estate, then an advancement will be charged against his distributive share of only that class of the intestate's estate to which the advancement belongs, and he will not be excluded from receiving his distributive share in the other class of estate; but where the statute does not show an intent to charge advancements first or altogether upon the class of property received, an advancement of realty will be charged against personal estate, or an advancement of personalty will be charged against real estate, so as not to allow the inheritance of any of the heirs to be diminished." 14 Cyc. 180, 181.

"I, Margaret Shelley, of the city, county and state of New York, being of sound disposing mind and memory, do hereby make, publish and declare this to be my last will and testament.

"First. I order and direct my funeral expenses to be paid as soon as shall be convenient after my decease.

"Second. I give, devise and bequeath my one-half interest in the building known as number twenty-two (22) Oliver street, in the Fourth ward of the city of New York, unto my daughter Lizzie, wife of Emanuel Ametrano, of the city of Brooklyn, county of Kings, state of New York, and to her heirs and assigns forever.

"I nominate, constitute and appoint Patrick J. Murphy, of the city of New York, and Charles Henry Hawkins, of the same place, or either of them, as executor of this my last will and testament.

"In witness whereof, I have hereunto set my hand and seal this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-one."

In 1896 condemnation proceedings were taken by the city of New York to acquire said number 22 Oliver street as a site for the erection of a schoolhouse. To these proceedings Margaret Shelley was not made a party. The net amount of the award after the satisfaction of the incumbrances on the property, amounting to $9,800, was in February, 1897, paid to her husband, Michael Shelley, who thereupon deposited one-half of the award, $4,900, in the Washington Trust Company to the credit of his wife as her share of the property. In 1898 Margaret Shelley drew the accrued interest on the deposit and $400 on account of the principal. She died in February, 1899, leaving an estate consisting entirely of personalty. The plaintiff is the devisee named in the will as well as the administrator of the estate of the deceased, and in this action which is for a settlement of her accounts, claims that she is entitled under the will to the fund received by the testator in the condemnation. She has been defeated in this claim by both the courts below and now appeals to this court.

The able opinion of the learned Appellate Division deals so fully with the question in dispute that there remains but little to be added by us. Had the deceased voluntarily alienated her property by deed it is entirely clear, under the authorities in this state, that the devisee would have no claim to the proceeds of the sale. Adams v. Winne, 7 Paige, 97; Beck v. McGillis, 9 Barb. 35; Gilbert v. Gilbert, 9 Barb. 532; Vandemark v. Vandemark, 26 Barb. 416; Philson v. Moore, 23 Hun, 152; McNaughton v. McNaughton, 34 N. Y. 201. "If a testatrix devises real estate and sells the same before the will takes effect, the proceeds of the sale will become personal estate, and no court can substitute the money received by the testatrix for the land devised." In Adams v. Winne, supra, and Beck v. McGillis, supra, the testator had taken back a mortgage on the devised land as security for the purchase money, yet it was held that the devisee was not entitled to the mortgage. The only point to be considered therefore, is whether

a different rule obtains in the case of involuntary alienation, by operation of law, from that which prevails on a voluntary sale. Mr. Jarman asserts that the rule is the same in both cases, and the English decisions cited by him sustain the doctrine of the text. Jarman on Wills, p. 163.

We see no such difference between a voluntary and an involuntary sale of the devised land as justifies a distinction in principle in the application of the rule that where the testator has parted with the subject of the devise, all claim of the devisee is lost. While there is no authority on the point in this state (there is said to be none in the country), the question presented is not without analogy in the rule which determines in cases of intestacy the character of the proceeds of sales by operation of law, whether they are to be considered as real or personal property. It is settled by a number of authorities that if the sale be made by execution or judicial decree in the lifetime of the intestate the proceeds are personalty and go to the next of kin, while if made after his death they are real estate and go to the heirs at law (Graham v. Dickinson, 3 Barb. Ch. 169; Denham v. Cornell, 67 N. Y. 556), except where the property belongs to an infant or to an incompetent person, in which case the proceeds retain their original character of realty. Sweezy v. Thayer, 1 Duer, 286; Horton v. McCoy, 47 N. Y. 21.

It is urged by the learned counsel for the appellant that the condemnation proceedings did not effect the revocation of the will, because there was no "other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed" (2 Rev. St. 64, § 42), nor any settlement, deed or other act by the testator (section 47). It may be conceded that there was no revocation of Mrs. Shelley's will, though I very much doubt whether the deceased was not divested of title by her own voluntary act. As she was not a party to the condemnation proceedings they were without force or effect as to her. If she lost her title it was because, by her voluntary acceptance of the award, she estopped herself from claiming the property.

Be this as it may, the case does not fall within the Statute of Wills. A specific devise or specific legacy may not be revoked, but unless the property devised or the thing bequeathed is found in the estate of the testator at the time of his decease the will is, necessarily, inoperative. The testatrix could not devise to the appellant an undivided half of the premises number 22 Oliver street, for she did not own it at her decease, and the question here presented is not whether the devisee shall receive the property devised, but whether she shall receive the fund which proceeded from the condemnation of that property. With this latter question the Statute of Wills does not deal. It does not provide affirmatively that a conveyance or other disposition of bequeathed or devised property shall render the will in that respect ineffective; it assumes that principle, and in sections 45, 46 and 47 merely limits the

operation of the rule by providing that in three cases, to wit, an executory contract, an incumbrance or mortgage and a conveyance or deed altering the testator's estate, but not wholly divesting his title, the devise shall be revoked only pro tanto. As said by the Chancellor in Adams v. Winne, supra, it left unchanged the existing law "that when the testator had converted real estate, which he had devised as such, into personalty, or had converted the subject of a specific bequest of personal property into real estate, there was a revocation of the will or an ademption of the bequest." The correctness of this doctrine has never been challenged.

The judgment appealed from should be affirmed, with costs to both parties payable out of the estate.

Judgment affirmed.[56]

In re TILLINGHAST.

(Supreme Court of Rhode Island, 1901. 23 R. I. 121, 49 Atl. 634.)

Petition for construction of a will. The facts are fully stated in the opinion.

BLODGETT, J. Upon the agreed statement of facts three questions arise under the fifth clause of the will of Ellen M. Perry, late of Bristol, deceased, concerning the disposition of the sum of $8,259.07, the cash balance now in the hands of the executor. The clause in question is as follows:

[56] See In re Slater, [1906] 2 Ch. 480; In re Donsett, [1901] 1 Ch. 398. Compare In re Freer, 22 Ch. D. 622 (1882); In re Wood, [1894] 2 Ch. 577.

"Where the law recognizes a power of implied revocation by acts of the testator similar to those which must result in ademption, there may in some cases be no distinction between ademption and revocation; but in this state, where such implied revocation is forbidden by statute, the clauses of a will containing a bequest are not revoked by acts which may operate as an ademption, but remain as the legal declaration of the testator's intention to be carried out unless the execution after his death is impossible; and so a present gift of a part only of a testamentary bequest, or a sale or conveyance to a third party of a part only of property specifically bequeathed, does not prevent the execution of the testator's intention as to the remainder, and the ademption is not total, but pro tanto." Hamersley, J., in Jacobs v. Button, 79 Conn. 360, 365, 65 Atl. 150, 152 (1906).

Where real estate devised by a will is conveyed away by the testator but before his death is reconveyed to him, there is no ademption under modern statutes allowing after-acquired realty to pass by will. Woolery v. Woolery, 48 Ind. 523 (1874). See, also, sections XXIII, XXIV, of the Wills Act in the Appendix, post, p. 765. But see Phillippe v. Clevenger, ante, p. 290.

"A total ademption by acts of a testator occurs in two cases only: (1) When he gives in his lifetime to a legatee what he has left him in his will; or (2) when before his death he so deals with the subject of the bequest as to render it impossible to effect the transfer or payment which the will directs." Baldwin, J., in Connecticut T. & S. Deposit Co. v. Chase, 75 Conn. 683, 690, 55 Atl. 171, 174 (1903).

That the testator has agreed with a corporation to take its note for some of its corporate stock bequeathed in his will does not work an ademption, where the testator dies before the arrangement is carried out, is held in In re Frahm's Estate, Roddewig v. Steffen, 120 Iowa, 85, 94 N. W. 444 (1903).

"Fifth. Whereas I am or may be entitled to a certain interest in the estate of my mother, Ellen M. Dabney, deceased, which is now in the hands of the Fidelity Insurance, Trust and Safe Deposit Company, Now I give, devise, and bequeath the same to the Fidelity Insurance, Trust and Safe Deposit Company, in trust, to keep the same invested, and to pay the net income thereof to my husband, Raymond H. Perry, for the term of his natural life, and upon his death then to pay the income thereof to his daughter, Frances Raymond Perry, for the term of her natural life, and upon her death then to hold the said estate in trust upon the same terms of trust as are above provided for in the fourth item hereof for the estate over which I have a power of appointment under the will of my said father, Charles H. Dabney."

These questions are:

(1) Does the language of said fifth clause constitute a specific legacy?

(2) If so, has such legacy been in whole or in part adeemed?

(3) Does the share of Mrs. Perry in the estate of her sister, Frances E. Rhett, come within the provisions of said fifth clause of the will of Ellen M. Dabney?

1. We are of the opinion that the bequest under consideration is a specific bequest. The language used is substantially similar to the language used by the court in Dean v. Rounds, 18 R. I. 437, 27 Atl. 515, 28 Atl. 802, as constituting a specific bequest. It absolutely appropriates a fund clearly defined, and for a long time invested in certain securities easily capable of identification, but whose exact cash value was not known, to one definite object. It was, therefore, an appropriation of the fund itself, rather than an attempt to measure the gift by the amount of an uncertain sum. Towle v. Swasey, 106 Mass. 106; Bethune v. Kennedy, 1 Myl. & Cr. 114; Stephenson v. Dowson, 3 Beav. 349; Shuttleworth v. Greaves, 4 Myl. & Cr. 37.

2. The will of Ellen M. Perry was executed on July 28, 1898, and she died on May 28, 1899. On May 11, 1899, she executed the following receipt to the trustee under Mrs. Dabney's will, as follows:

"Received of the Fidelity Insurance, Trust and Safe Deposit Company, trustee, the sum of eleven thousand five hundred and fifty-eight and $^{92}/_{100}$ dollars in kind as set forth in the schedule hereunto annexed, the same being in full of principal and income awarded to me as per the adjudication filed in the Orphans' Court, December 30th, 1898, upon the account of the said The Fidelity Insurance and Safe Deposit Company, trustee, as aforesaid. [Signed] Ellen M. Perry.

"Witnesses at signing:

"Nellie De Wolf Archer.

"Abram O. Powell."

It is agreed that all the securities therein referred to were then delivered to Mrs. Perry, except the two mortgages on property in Philadelphia, which were duly assigned to her by the trust company, but which she directed the trust company to retain in its possession and to

proceed to collect for her account. It is conceded, too, that with the exception of these mortgages all the securities enumerated in this schedule were converted by Mrs. Perry to her own uses in her lifetime. We are consequently of the opinion that the legacy was thereby pro tanto adeemed, since the specific items of the bequest no longer exist.

In Kenaday v. Sinnott, 179 U. S. 606, 617, 21 Sup. Ct. 233, 237, 45 L. Ed. 339, decided in 1900, Chief Justice Fuller says: "The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed and the intention that the legacy should fail is presumed."

In Tomlinson v. Bury, 145 Mass. 347, 14 N. E. 137, 140, 1 Am. St. Rep. 464, decided in 1887, the court say:

"A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator so that it can be identified. It can only be satisfied by the thing bequeathed; if that has no existence when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator."

This doctrine has long been well settled. Indeed, the rule as to ademption was laid down very clearly by Lord Chancellor Thurlow in Humphreys v. Humphreys, 2 Cox, 185, decided in 1789, as follows:

"That the only rule to be adhered to was to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for if it did not, then there must be an end of the bequest, and that the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." And see Stanley v. Potter, 2 Cox, 180.

As to the two mortgages aforesaid, we are of the opinion that the mere act of transferring them to her own name was not an ademption of them; for it is conceded that they were in specie at the time of her death, and the exact amount of their proceeds is clearly known and is held by the executor as a distinct fund. Lee v. Lee, 27 L. J. Ch. 824; Moore v. Moore, 29 Beav. 496; Dingwell v. Askew, 1 Cox, 427; Clough v. Clough, 3 Myl. & K. 296; Ashburner v. MacGuire, 2 Bro. C. C. 108; Barker v. Rayner, 5 Madd. 217, affirmed in 2 Russ. 122; Basan v. Brandon, 8 Sim. 171.

It is true that these securities are described as being in the hands of the trust company; but in Prendergast v. Walsh, 58 N. J. Eq. 149, 42 Atl. 1049, decided in 1899, which was also a case of ademption, the Vice Chancellor held that "the place of deposit was merely used as descriptive of the thing bequeathed. It was used to identify the particu-

lar money given, and it is entirely settled that where the place is merely descriptive the removal of the thing to another place is immaterial."

And, finally, we are of the opinion that the terms of the fifth clause, creating this specific legacy, should be strictly limited to the interest which Mrs. Perry had in the estate of her mother, Mrs. Dabney, without including the interest which came to Mrs. Perry as the heir of her sister, Mrs. Rhett.

A decree may be entered in accordance with this opinion.[57]

CARMICHAEL v. LATHROP.

(Supreme Court of Michigan, 1896. 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232.)

HOOKER, J. The will of Henry P. Pulling was executed in June, 1872. After giving his wife the use and enjoyment of all of his property during life, in lieu of dower, it provided that—

"Second. All the remainder of the estate of, in, and to my said property, both real and personal, subject to the said life estate of my said wife, I give, devise, and bequeath to my three daughters, Ada M. Lathrop, of Detroit, Michigan, Emily Lloyd, of Albany, New York, and Marilla B. Carmichael, of Amsterdam, New York, and to their heirs forever, share and share alike. * * *

"Third. I hereby authorize and empower my hereinafter named executors to sell and convey in fee simple absolute, in their discretion, any portion or all of my real estate, with a view of otherwise invest-

[57] In Peirce, Petitioner, 25 R. I. 34, 54 Atl. 588 (1903), a bequest of stock in the Rhode Island National Bank was held to pass stock in the United National Bank, which latter bank was a reorganization and consolidation of the former bank and three others. The court said: "There was no ademption of the legacy of the stock in the Rhode Island National Bank, because, though in form a sale, the stock was not in fact sold, but exchanged." But see In re Lane, 14 Ch. D. 856 (1880).

"No doubt a bequest may be so worded as to show that the subject-matter was to pass, whatever the condition with respect to investment, or otherwise, in which it might be found at the testator's death. And what is the proper effect to be given to the gift of a sum of money mentioned or described as invested in a particular way depends upon the question whether, according to the true construction of the will, it must be taken that the testator intended the legatee to have the money however it might be invested, or, in other words, whether the condition of the subject in reference to investment was the governing part of the description of the subject-matter of the bequest." Joyce, J., in In re Slater, [1906] 2 Ch. 480, 484. See Prendergast v. Walsh, 58 N. J. Eq. 149, 42 Atl. 1049 (1899); In re Bradley's Will, 73 Vt. 253, 50 Atl. 1072 (1901); Nusly v. Curtis, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113 (1906).

In In re Gillins, [1909] 1 Ch. 345, the will gave a legatee 25 shares of stock in a certain corporation. At the date of the will shares in that corporation were £50 shares with £5 credited as paid up. At the death of the testator the shares of the corporation were £10 shares with £1 credited as paid up. It was held that the legacy was general, and so only 25 £10 shares passed to the legatee.

ing the proceeds thereof, or to change my present securities into real investments. But such change is to be done with the consent of my wife, and the approval of the probate court or a court of chancery. And this power and authority of so selling and conveying in fee simple absolute my real estate is hereby made notwithstanding the bequests which are given to my daughters, which bequests are hereby made subservient to said power. And I do hereby direct my executors to invest all my moneys and property, and the avails of all real estate so sold, in first-class, unincumbered real estate mortgages, or in United States bonds or Michigan state bonds, said securities to be held and retained by them, and the income thereof paid quarter yearly, or, at the furthest, every half year, by them, to my said wife, until her decease, and on such death my estate is to be closed up and distributed as provided for in the second clause of this my will.

"And, lastly, I do hereby appoint my brother Abraham C. Pulling, of New York City, my brother-in-law William P. Bridgman, of Detroit, and my son-in-law Joseph Lathrop, of Detroit, to be the executors of this my last will and testament, hereby revoking all former wills by me made."

Mr. Pulling died in July, 1890, and the will was probated August 19, 1890. Joseph Lathrop qualified as executor. The probate records show that at the time of the testator's death he was seised in fee of real estate to the value of $65,000, that there was due to him upon land contracts $45,000, that he owned other personal property to the amount of $30,000, and that there were no debts or claims against the estate. Previous to the death of the testator, he conveyed to each of the defendants a parcel of real estate; that conveyed to Mrs. Lloyd being alleged to be worth $14,000, and that received by Mrs. Lathrop said to be worth $10,000. There is evidence tending to show that he intended to repair the house upon Mrs. Lathrop's property, thereby making the gift to her equal to that of Mrs. Lloyd, and that he intended to do as well by his other daughter, the complainant; but her husband became embarrassed, and finally went to state's prison, and she never received a home, as the others had. Her father, however, gave to her money from time to time, for her support, which aggregated $1,100. Soon after the probate of the will, litigation arose between the widow and children, which was finally adjusted, and the property was divided, the parties executing the necessary deeds and other instruments to carry it into effect. The accounts of Lathrop, the executor, were settled, and he was discharged. There is now some land held in common by the three sisters.

The complainant files the bill in this cause, alleging that the lands conveyed by the testator to her two sisters should be treated as ademptions of their respective legacies, and that they should be required to account to her for her share thereof. She alleges that her father so intended, and that they recognized the justice thereof, and promised to see that she received the same, and, relying upon such promises, she

consented to the settlement of the estate, expecting that her sisters would pay her an amount equal to her share of said parcels so received by them. It seems tacitly agreed that this record involves only the question whether the property conveyed to Mrs. Lloyd and Mrs. Lathrop before the testator's death should be applied upon their respective interests under the will, or, in other words, as the counsel for the complainant state it, whether it can be treated as an ademption or a satisfaction pro tanto of their bequests. We are perhaps at liberty to assume from the pleadings and admitted facts that the defendants received sufficient personal property under the will to more than cover the claim of the complainant; in other words, that they have received bequests to such amount in addition to any lands that they may have received. As to such personal property, the will made the sisters legatees, although they may have been also devisees as to the real estate, if the contention of the defendants' counsel is correct. In other words, they are none the less legatees, taking bequests of personal property, because one and the same provision of the will gave them both personal and real property. Hence we need spend no time upon the question whether the terms of the will made them devisees, as there are legacies sufficient to support the ademption contended for. We can therefore eliminate some of the questions which arise where an attempt is made to apply the doctrine of satisfaction to a devise of real property by reason of the conveyance to the devisee of other property. The case is one where it is claimed that a gift of personal property by will may be satisfied by a conveyance of land, when such is the clear intention of the testator.

If a person should bequeath to another a sum of money, and, previous to his (the testator's) death, should pay to such person the same amount, upon the express understanding that it was to discharge the bequest, the legacy would be thereby adeemed. But, in the absence of an apparent or expressed intention, that would not ordinarily be the effect of the payment of a sum of money to a legatee under an existing will. Generally, such payment would not affect the legacy. To this rule there is an exception, where the testator is a parent of or stands to the legatee in loco parentis. In such case the payment would be presumed to be an ademption of the legacy. At first blush this impresses one as an unreasonable rule, as it puts the stranger legatee upon a better footing than the testator's own son, and judges and lawwriters have severely condemned the rule. See 2 Story, Eq. Jur. §§ 1110–1113. It has been said that "this rule has excited the regret and censure of more than one eminent modern judge, though it has met with approbation from other high authorities." 2 Williams, Ex'rs (7th Am. Ed.) *1194. Story's condemnation of it is strong, but he adds: "We must be content to declare, 'Ita lex scripta est.' It is established, although it may not be entirely approved." And Worden, J., in Weston v. Johnson, 48 Ind. 5, says, "Whatever may be thought of the doctrine, it is thoroughly established in English and American

jurisprudence." Shudal v. Jekyll, 2 Atk. 518; Ex parte Pye, 18 Ves. 140, 2 White & T. Lead. Cas. Eq. (4th Ed.) 741; Van Houten v. Post, 33 N. J. Eq. 344.

With a refinement of logic, characteristic, the early English judges held that the intention to adeem a legacy is to be presumed from the advancement of a part of the legacy, on the theory that it was the testator's right to do so, and that he must be presumed to be the best judge of the propriety of a revocation (Ex parte Pye, 18 Ves. 140); but the rigor of this rule has been relaxed, and cannot now be said to be the law. Pym v. Lockyer, 5 Mylne & C. 29, 55; Montague v. Montague, 15 Beav. 565; 2 Williams, Ex'rs (7th Am. Ed.) *1195; Hopwood v. Hopwood, 7 H. L. Cas. 728; Wallace v. Du Bois, 65 Md. 153, 159. And see cases cited in 1 Pom. Eq. Jur. § 555, note 3.* There are cogent reasons in support of the rule stated—i. e., that payment to a son adeems the legacy—which is based on the theory that such legacy is to be considered as a portion, and that the father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one, oftentimes the least worthy. Double portions were considered inequitable, and upon this the doctrine rests. Suisse v. Lowther, 2 Hare, 424, 433.

While the authorities are a unit that a legacy by one in loco parentis will be adeemed by payment, in the absence of an apparent or expressed intent to the contrary, the doctrine was early restricted. Among other limitations was the rule that the presumption could not be applied to a residuary bequest, because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed. Freemantle v. Bankes, 5 Ves. 85; Clendening v. Clymer, 17 Ind. 155; 2 Story, Eq. Jur. § 1115. This exception fell with the discarding of the rule that satisfaction must be in full. Pym v. Lockyer, 5 Mylne & C. 29; Montefiore v. Guedalla, 1 De Gex, F. & J. 93. Again, it was held that it could not be applied unless the advancement was ejusdem generis with the legacy. See 2 Story, Eq. Jur. § 1109.

* "It seems to have been originally held that complete ademption resulted, even when the subsequent payment was less than the amount of the legacy—this on the theory that the legacy is the child's portion, and that a subsequent advancement is in lieu of such portion. See Hartop v. Whitmore, 1 P. Wms. 681 (1720); Clarke v. Burgoine, 1 Dick. 353 (1762); Ex parte Pye, 18 Ves. 153 (1811). But this view is no longer recognized. See 2 Story, Eq. Jur. § 1111; Paine v. Parsons, 14 Pick. (Mass.) 318 (1833).

"The question as to whether a testator is to be considered as standing in loco parentis depends upon the circumstances of each particular case. The test is whether the testator means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making provision for the child. 2 Wms. Ex'rs, 1338. Great-uncles, uncles, grandfathers, and grandmothers are not to be considered in loco parentum unless such is their intention. Id. 1339." Gardner on Wills, 569, note.

Counsel for the defendants contends that "the conveyance of real estate after the making of a will is held not a satisfaction of any legacy, in whole or in part, even though that was the clear intent of the testator," and he cites several authorities to sustain the proposition. In Arthur v. Arthur, 10 Barb. (N. Y.) 9, it was held that "a conveyance made subsequent to a devise of land is not a revocation or satisfaction of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, that is a revocation pro tanto." This was a case where the court found that the grantor intended and the grantee expected the land conveyed would be in lieu of the grantee's share under the will. It was said that to hold that the conveyance was a satisfaction was to hold that the will might be revoked by implication, which could not be tolerated under the statute of frauds. This case contains an elaborate discussion of the subject, and cites many of the earlier authorities bearing upon it.

The Court of Appeals considered the subject in Burnham v. Comfort, 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462. In this case it was claimed that a devise of real property was satisfied by the payment of money, on the express understanding, evidenced by the receipt of the devisee, that it was received as a part of her father's estate. The court said that, to sustain such claim, they must hold that it operated as a revocation of the will, which would contravene "the spirit, if not the letter," of the statute of frauds, and that the proposition "lacked support in principle as well as authority." The opinion then asserts that "the rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty." After discussing the question of intention, and intimating that, while a presumption of intention that the gift should be in satisfaction would exist if the case were one involving a legacy, it would not in case of a devise, it proceeds to show that the statute of frauds, which extends to wills, was an unsurmountable barrier to the application of the rule contended for, as to devises. Two members of the court dissented.

The Supreme Court of South Carolina, in the case of Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716, had occasion to consider a case where the legatees were also devisees, as in the present case. It was held that payments of money were to be considered as made in satisfaction of the legacies, but not the devises. The court said:

"It would seem that, upon the same principles, devises of real estate ought likewise to be adeemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisees with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate, and, in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator, and disturb that distribution of his property which he thought was proper and just to his de-

scendants. For, while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given effect where it is in conflict with the rules of law. A devise of real estate cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until it is revoked or altered in the manner prescribed by law."

Attention is also called to the case of Swails v. Swails, 98 Ind. 511. In this case land was devised as follows: 88 acres to J.; 36 acres to N. Subsequently the testator conveyed portions of the same land as follows, viz.: 60 acres to J., the son; and 40 acres to N., a grandson. It was held that the deeds did not revoke the devise of the 24 acres to N., and that the doctrine of ademption does not apply to specific devises of real estate, nor where the devisor does not stand in loco parentis. The case followed Weston v. Johnson, 48 Ind. 1, where it was held that the doctrine of ademption of legacies by advancement to the legatee by the testator in his lifetime has no application to devises of real estate. Again, in Campbell v. Martin, 87 Ind. 577, it is said, "But we know of no reason whatever for the extension of this doctrine, and making it applicable to devises of real estate."

In Marshall v. Rench, 3 Del. Ch. 239, the court admits that in some cases a conveyance to a devisee after the making of the will would operate in like manner as the ademption of a legacy—e. g., where the conveyance to the devisee is of the same land—because "by such a conveyance the testator executes his devise, precisely as the settlement of a portion on a legatee is an ademption of the legacy." The court adds that "the conveyance to a devisee of lands other than those devised, or of an interest in lands different from that devised, has never been held an implied revocation of the devise." The authorities cited in support of this are all ancient, except Arthur v. Arthur, hereinbefore discussed.

We mention at this point the fact that all of these were cases where the attack was made upon a devise, merely, except the South Carolina case, and in that case the claim of ademption was sustained as to the legacies.

2 Woerner, Adm'n, p. 978, is cited in support of defendants' contention. This author dismisses the subject with the statement that—

"Specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion. And, for the same reason, real estate devised is held not to come within the rule; but this exception is repudiated in Virginia, and unfavorably commented on elsewhere." See Hansbrough v. Hooe, 12 Leigh (Va.) 316, 37 Am. Dec. 659.

The authorities cited have been commented on at length for the purpose of showing that they differ from the case before us, inasmuch as they were cases where it was sought to treat conveyances as satisfactions of devises. This is not a case where an attempt is made to

deprive a devisee of title to land willed to him, but it is claimed that the presumption that a bequest to a son is satisfied pro tanto by a gift is not to be applied where the gift is of land instead of money, or other personal property ejusdem generis.

In Richards v. Humphreys, 15 Pick. (Mass.) 140, will be found the following dictum of Shaw, C. J.:

"We have seen that ademption depends solely upon the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had the money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. Had he purchased a house or other property in her name, and for her benefit, with the like intent and purpose expressed, it would have had the same effect."

It is apparent that the law looks upon a legacy to a son as a setting off of his portion. Also, it is plain that a subsequent gift, unless it be of real estate, is presumed to be in satisfaction pro tanto of the legacy. It is also settled that whether the gift is to be considered an ademption of a legacy must depend upon the intent of the testator alone. A gift of personal property to a son may be shown not to have been so intended, but the burden is upon the legatee. Ford v. Tynte, 2 Hem. & M. 324. A gift to a stranger may be shown to have been intended as an ademption, but here the presumption is the other way, the burden being upon the administrator to show such intent.

There can be no doubt that a testator's conveyance of real property may constitute an ademption, if he so intends it, e. g., where he expresses the intent in the conveyance, and possibly in other ways. If so, the only significance of the doctrine ejusdem generis is its effect upon the presumption. The doctrine that the property conveyed must be ejusdem generis appears to be the only ground upon which it can be said that the conveyance in this case should not be treated as satisfaction pro tanto. It has been said in early cases that "when the gift by will and the portion are not ejusdem generis, the presumption will be repelled. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land." Bellasis v. Uthwatt, 1 Atk. 428; Goodfellow v. Burchett, 2 Vern. 298; Ray v. Stanhope, 2 Ch. R. 159; Saville v. Saville, 2 Atk. 458; Grave v. Earl of Salisbury, 1 Brown, Ch. 425. But see Bengough v. Walker, 15 Ves. 507.

The courts have not accepted without protest the proposition that the application of the presumption arising from the relation of parent and child should depend upon the similarity of the property willed and donated, and it has been asked "why, if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of lands of equal value." And see Pym v. Lockyer, 5 Mylne & C. 44. But all agree that ademption is a matter of intent. In Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761, the court said, "This whole class of cases depends upon the intention;"

citing Hoskins v. Hoskins, Prec. Ch. 263, and Chapman v. Salt, 2 Vern. 646. Again, it was said: "It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to intention"—citing Rickman v. Morgan, 1 Brown, Ch. 63, 2 Brown, Ch. 394.[58] In Bengough v. Walker, 15 Ves. 507, it was held that a bequest of a share in powder works, charged with an annuity, was a satisfaction of a portion of £2,000, when it was so intended. See, also, Gill's Estate, 1 Pars. Eq. Cas. (Pac.) 139.

It is forcefully argued that these cases make obsolete the doctrine of ejusdem generis. Whether they do or not, they certainly show that it must yield to the testator's intent. We cannot, therefore, accede to the proposition of counsel for the defendants "that conveyance of real estate will not be held a satisfaction of any legacy, in whole or in part, even though the intent of the testator is clear."

We think the testimony shows the testator's intent. There may be testimony in the record that was incompetent to prove it, but there is sufficient that was competent. The widow was conversant with the entire transaction, and the defendants' statements are admissions of their knowledge of such intentions.

It is contended that "the allowance of a conveyance of property as a satisfaction of a devise or legacy would be equivalent to a revocation of the will in part, and it would have to be proven in the manner provided by our statute for the revocation of wills, that is, by the destruction of the will, or the making of a new will." 2 How. Ann. St. § 5793; Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545. We think it should not be called a revocation of the will. The defendants' bequests are permitted to stand unquestioned, and matter in discharge of the obligation (i. e., payment) is shown. The will is not overturned or revoked. It is satisfied.

We think the prayer of the bill should be granted, and the record should be remanded to the circuit court for the county of Wayne, in chancery, for further proceedings. Decreed accordingly.[59]

[58] "It is now held that whether a residue shall be held to be adeemed or not is a question of intention, as in other cases of ademption. Montefiore v. Guedalla, 6 Jur. (N. S.) 329; Williams on Executors, 1334, 1335." The Ordinary, in Van Houten v. Post, 32 N. J. Eq. 709, 712 (1880). But see Davis v. Whittaker, 38 Ark. 435 (1882).

[59] Compare In re Youngerman's Estate, 136 Iowa, 488, 114 N. W. 7 (1907). An advancement to a husband by his father-in-law may be held to be an advancement to the wife. See McCabe v. Brosenne, 107 Md. 490, 69 Atl. 259 (1908). And even, it seems, though the wife is ignorant of the deed of gift. Ireland v. Dyer (Ga.) 67 S. E. 195 (1910).

On whether a subsequent benefit to a legatee to whom the testator does not stand in loco parentis is an ademption or satisfaction of the legacy, see 15 Am. & Eng. Ann. Cas. 248, note.

IZARD v. HURST.

(High Court of Chancery, 1697. 2 Freem. C. C. 224.)

See ante, p. 360, for a report of the case.[60]

JAQUES v. SWASEY.

(Supreme Judicial Court of Massachusetts, Essex, 1891. 153 Mass. 596, 27 N. E. 771, 13 L. R. A. 566.)

Appeal, by residuary legatees under the will of Anna Jaques, from a decree of the probate court allowing to William H. Swasey, the executor, the sum of $10,000, paid by him to Harriet M. Downs as a legacy under the will.

W. Allen, J. The appellants contend that the sum of $3,000, paid by the testatrix in her lifetime to Mrs. Downs, should be deducted from the legacy of $10,000 to her. The payment was made several

[60] "Equity leans against double portions, and the general rule is that wherever a legacy given by a parent, or a person standing in loco parentis, is as great as or greater than a portion previously secured to the legatee upon marriage or otherwise, a presumption arises that the legacy was intended as a satisfaction of the portion. If the legacy is less than the portion, a presumption arises that it was intended as a satisfaction pro tanto. And a share of residue is on the same footing as a pecuniary legacy as regards the rule against double portions. Thynne v. Earl of Glengall, 2 H. L. C. 131." Swinfen Eady, J., in In re Blundell, [1906] 2 Ch. 222, 226, 227.

"It is not every gift, every provision made by a parent for the benefit of his child, that is a portion. I think that a portion implies something that, having regard to the circumstances of the parties, may be called a substantial provision. If I had left my son a £10,000 legacy, he would not be called to account for every £5 note that I gave him on his birthday. On the other hand, the term 'portion' does not imply that there is a solemn marriage settlement, or the purchase of a business or an estate. Any considerable sum of money might be regarded as a portion. See Leighton v. Leighton, L. R. 18 Eq. 458." Maitland's Equity and the Forms of Action at Common Law, 188.

"In In re Furness, [1901] 2 Ch. 346, a testator by his will made in 1885 gives £20,000 to his daughter, directing that £15,000 [thereof] shall be settled on certain trusts for her and her children. On her marriage in 1893 he settles £7,360 consols upon her and her children, but the trusts are not the same. It is undisputable that as regards her interest there is ademption pro tanto. The question is whether it is to be treated as in ademption of the settled £15,000 or of the unsettled £5,000. Joyce, J., holds that it is in partial ademption of the former. The case shows the strength of this presumption [that a benefit given by the will is meant to be a satisfaction of a portion debt]." Id., 190.

In In re Heather, [1906] 2 Ch. 230, where the testator's will gave a £3,000 legacy to his adopted daughter and the residue of his estate to that adopted daughter and to a person to whom he did not stand in loco parentis, and where the testator, after the date of his will and codicils gave the daughter £1,000 to invest for her own benefit, it was held that neither the £3,000 legacy nor the residuary gift to the daughter was pro tanto adeemed, because (per Swinfen Eady, J.) "a rule designed to produce equality among children cannot be extended so as to reduce their shares for the benefit of a stranger."

years before the will was executed, and cannot operate as an ademption or payment or advancement pro tanto of the legacy. To give such an effect to it would be to vary the terms of the will, and to show by parol that the testatrix intended a legacy of $7,000, and not $10,000. Payment of a legacy provided for in a will made by the testator before the will takes effect by his death is regarded as consistent with and carrying out the intention expressed in the will; but to apply a gift made before the execution of the will in full or part satisfaction of a legacy given by the will necessarily varies the terms of the legacy, and allows the intention expressed in the will to be controlled by a different intention proved by parol. If a gift is made by a parent to a child, it may be presumed to be an advancement of a portion of the parent's estate which he has given to the child by will, or which the law may give if the parent dies intestate; but if, after making such gift, the parent by will fixes the portion of the child, the former gift cannot be taken as a part of the portion unless made so by the will. It cannot by possibility be an ademption of the legacy. If it can operate as a satisfaction of the legacy, it must be upon other grounds than the right of the testator to adeem a legacy. Paine v. Parsons, 14 Pick. 318; Richards v. Humphreys, 15 Pick. 133; Jones v. Richardson, 5 Metc. (Mass.) 247, 253; Hartwell v. Rice, 1 Gray, 587, 594. See authorities collected in note to Chancey's Case, 2 White & T. Lead. Cas. (4th Am. Ed.) p. 782 et seq. It has been held that a payment by a father to a child will operate as a satisfaction pro tanto of a legacy to the child in a subsequent will, when it is received by the child under a promise by him that it shall be so applied. In that case the money is received by the child as a part of the portion to be designated in the will, and it would be fraudulent in him not to allow it in satisfaction pro tanto of the legacy given in pursuance of the understanding. Upton v. Prince, Cas. t. Talb. 71; Taylor v. Cartwright, L. R. 14 Eq. 167, 176; Yundt's Appeal, 13 Pa. 575, 53 Am. Dec. 496; Musselman's Estate, 5 Watts (Pa.) 9; Kreider v. Boyer, 10 Watts, 54; Rogers v. French, 19 Ga. 322.

The real question in the case at bar is whether it was understood between Miss Jacques, the testator, and Mrs. Downs, when the $3,000 was given by the former to the latter, that that sum was paid and received as part of a portion to be given to Mrs. Downs by will, and was pro tanto in satisfaction of the subsequent legacy. In the year 1874, Mrs. Downs, then Miss Smith, went to live with Miss Jacques, who was a single woman, well advanced in life, as her daughter, with the understanding that if she continued to live with Miss Jacques during her life Miss Smith would be treated as a daughter, and would be provided for in the will of Miss Jacques by a legacy of $10,000. As regards advancements of a portion, Miss Jacques stood practically in loco parentis to Miss Smith, and it may be assumed that the rules that apply to advancements and legacies between parent and child applied to them. Miss Jacques made a will about the time Miss Smith

went to live with her, in which she gave "to Harriet M. Smith, my adopted daughter, provided she lives with me until my decease, ten thousand dollars." In January, 1876, Miss Jacques made another will, in which she gave to Miss Smith "the sum of ten thousand dollars in cash, provided she lives with me until my decease."

In the same year Miss Smith was married, and after her marriage the $3,000 was paid to her, and she gave the following writing: "Newbury, Nov. 29, 1876. Whereas, Miss Anna Jacques has intimated to me that in her will of January 31st, A. D. 1876, she has devised a certain sum of money on certain conditions, now, being desirous of purchasing a house and land adjoining the same, she (Miss Jacques) has kindly advanced to me the sum of three thousand dollars by the hands of Edward P. Shaw, this day. I hereby acknowledge to have received the said sum of three thousand dollars in advance of and on account of said legacy, and in settlement of said estate if the conditions above mentioned are fulfilled it shall be deducted from the said legacy aforesaid, and I bind myself by this receipt to perform above agreement, to allow the deduction to the executors of the said estate." This was signed by Mrs. Downs, and attested by a witness. Mrs. Downs continued to live with Miss Jacques until her death, in January, 1885. In August, 1882, Miss Jacques made a new will, which expressly revoked former wills, and contained this clause: "Item 7. I give and bequeath to Harriet M. Downs, wife of Willard O. Downs, the sum of ten thousand dollars if she shall survive me; but if she shall not survive me, in such case I give and bequeath the same (ten thousand dollars) to her children who may be living at the time of my decease."

This will was admitted to probate. Unquestionably the payment of the $3,000 would have been an advancement of so much of the legacy given by the will of 1876, and an ademption pro tanto of it, had the instrument which contained it become the will of Miss Jacques. But the will was revoked, and a subsequent will executed; and the intention of Miss Jacques that the payment should be in satisfaction of a legacy given by the subsequent will cannot of itself be given in evidence to control the plain terms of the actual will. Unless that intention was understood and assented to by Mrs. Downs when the payment was made, it cannot be taken as satisfaction pro tanto of the subsequent legacy. The paper signed by Mrs. Downs does not show any contract or understanding that the payment should be in satisfaction of a subsequent legacy. It refers and is limited to the legacy in the will of 1876. The fact that it was understood that Mrs. Downs should have a portion of the estate of Miss Jacques can have no greater effect than to place her in the position of a child who expected a portion. The fact that $10,000 had been mentioned when the relation of the parties commenced as the amount of the portion, and was the amount of the legacy in the existing will, does not show that Mrs. Downs in accepting an advancement of a part of that legacy agreed to receive it in satis-

faction of an equal amount of any future legacy that might be given to her, there was nothing in the transaction which could prevent Miss Jacques from revoking the legacy and giving a new legacy for any amount she might choose, nor that could prevent Mrs. Downs from receiving the full amount of a subsequent legacy. The writing is limited to the legacy mentioned in it, and cannot of itself affect any subsequent gift.

The only other evidence upon which the appellants rely for proof that Mrs. Downs agreed to receive the $3,000 in satisfaction of a future legacy is conversations between Miss Jacques and Mrs. Downs after the last will was executed. So far as these go only to show the intention of Miss Jacques in advancing the $3,000 they are immaterial, unless they also show an admission by Mrs. Downs that she received the payment in satisfaction of the subsequent legacy. They do not show any such admission. On the contrary, Mrs. Downs said that she was to have the $10,000, and Miss Jacques said that $3,000 of it had been paid. The fact that Mrs. Downs made no reply to this cannot be taken as an admission of its truth. She had already stated her understanding of it, and the remark of Miss Jacques was in answer to her. She cannot be held to have assented to Miss Jacques' statement, because she did not continue the discussion. The report does not find that Mrs. Downs accepted the advance of $3,000 with the understanding that it should be in satisfaction pro tanto of a future legacy, and the facts and evidence reported do not show that she received it with such understanding or that she agreed that it should be so applied. As no contract is found or can be inferred, it is not necessary to consider the further objection made by the executor that the legacies are substantially different. The legacy which was adeemed in part was to Miss Smith alone, and would lapse by her death, and was on condition that she lived with the testatrix until her decease, and it conformed to the original agreement between the parties. The subsequent legacy was without condition, and included children of Mrs. Downs if she did not herself survive the testatrix.

Without deciding that a promise to accept a present sum in satisfaction of a future legacy in the terms of the former could not be extended to the different legacy actually given, we think that it does not appear that the payment was received in satisfaction pro tanto of any future legacy. Decree affirmed.[61]

[61] "The doctrine of satisfaction presupposes that there is some obligation to be satisfied; but a completed gift is a completed gift and cannot require satisfaction. Thus if I establish my son in trade, buy a business for him for £5,000, and pay the money, or if when my daughter marries I transfer £5,000 worth of shares to the trustees of her settlement, here is a completed gift; if afterwards I bequeath £5,000, or any other sum, to my son or daughter, there can in this case be no talk of satisfaction, for there is nothing to be satisfied." Maitland's Equity and the Forms of Action at Common Law, 183.

In re BRIDLE.

(Court of Common Pleas Division, 1879. 4 C. P. D. 336.)

Petition by Louisa Bridle, asking for the payment out of court to her of £200.

John Bridle died in 1877. By his will, made in 1872, he bequeathed to the petitioner the mortgage of £200 which he had secured to him on a mortgage of premises in Melcombe Regis. The petitioner, against the objection of the executors of John Bridle's will and of the residuary legatees thereunder, introduced evidence that in 1873, the mortgage above mentioned was paid off; that John Bridle paid the mortgage money into the bank of Williams & Co.; that he had a regular account at that bank; that he did not pay this money into his general account, but had it entered in his name to a separate account, which he opened with the bank for that purpose; that he received a separate pass-book; that he handed this pass-book into the custody of the petitioner, stating to her, when he did so, that it was the money he had received from the mortgage, and that she was to keep the book, as he had willed the money to her, for her to receive it after his death, and stating that it would show that the money was for her, and would do away with the necessity of altering his will in consequence of the mortgage being paid off; and that the £200 remained intact in the bank down to the death of John Bridle, he only drawing the interest from time to time, and the petitioner retaining possession of the pass-book. This evidence was uncontradicted. Williams & Co. paid the money into a post-office savings bank in the name of the registrar of the County Court to await the decision of the court.

The judge ordered the costs of all parties to be paid out of the £200 and the balance to be paid to the petitioner. The executors and residuary legatees appealed.

DENMAN, J.[62] The testator by his will bequeathed to the petitioner "the mortgage debt of £200 which he had secured to him on a mortgage of premises in King street, Melcombe Regis, belonging to William Hardy." It is impossible to read those words without seeing that the obvious intention of the testator was to give her the mortgage itself. Has there, then, been an ademption? That depends upon the rule stated by Lord Hardwicke, C., in Humphreys v. Humphreys, 2 Cox, C. C. 184, where he said that "the only rule to be adhered to was, to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for, if it did not, then there must be an end of the bequest; and that the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." * * * In the case of a specific be-

[62] Parts only of the opinions are given.

quest of a thing which has ceased to exist during the lifetime of the testator, the legacy is adeemed.

LINDLEY, J. I am of the same opinion. The first question here is what was bequeathed to Louisa Bridle. It is a bequest of a mortgage —a specific legacy. The only other question is, where is it? It is not to be found; and there is an end of it. * * * And see the judgment of Lord Thurlow in Stanley v. Potter, 2 Cox, C. C. 180, where it was held that a bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally.[63] For these reasons, I am of opinion that the petitioner is not entitled to the £200, and the judgment of the County Court judge must be reversed, with costs.

Judgment reversed.[64]

COWPER v. SCOTT.

(High Court of Chancery, 1731. 3 P. Wms. 119.)

The last point of the case[65] was, the testator Bedel had devised all his personal estate in sevenths, viz., one seventh to each child; after which his son, being the eldest child, died in the testator's lifetime, and then the testator died, by which means the son's seventh became distributable according to the statute, the executors being declared by the will to be but trustees; and four of the testator's daughters being married, and having been advanced by their father in his lifetime, it

[63] See Wyckoff v. Perrine's Ex'rs, 37 N. J. Eq. 118 (1883); Succession of Batchelor, 48 La. Ann. 278, 19 South. 283 (1896); Rogers v. Rogers, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721 (1903); Tanton v. Keller, 167 Ill. 129, 47 N. E. 376 (1897). But see In re Bradley's Will, 73 Vt. 253, 50 Atl. 1072 (1901).

"The bequest was of certain notes [for $1,200] secured by mortgage of land. The testator surrendered those notes in his lifetime, and took a reconveyance of the property for which they had been given. He afterwards sold the same property to another and took notes [for $600] for it that were unpaid when he died. We think the legacy had been adeemed and that the notes now held by the executor constitute a part of the estate to be distributed among the heirs. The legacy was specific and the subject of it had been disposed of by the testator in his lifetime." Haskell, J., in Tolman v. Tolman, 85 Me. 317, 320, 321, 27 Atl. 184, 185 (1893). But that taking renewal notes will not be an ademption of notes bequeathed, and the new notes will pass, was held in Ford v. Ford, 23 N. H. 212 (1851).

[64] There is a broad distinction between the gift of a debt as a debt and the sum of money produced when the debt has been recovered and has ceased to be a debt. In the one instance the legacy is specific, and the collection of the debt in the testator's lifetime will adeem the legacy. On the other hand, the gift extends to and includes the fund in the altered state, because, being a gift of the fund, the thing given will pass, though it be not in the precise state it was when the will was executed." McSherry, J., in Littig v. Hance, 81 Md. 416, 432, 32 Atl. 343 (1895). Compare Georgia Infirmary, etc., v. Jones (C. C.) 37 Fed. 750 (1889).

[65] The other points in the case are omitted.

was therefore contended, that this seventh, which was the son's share, becoming distributable according to the statute, the four sisters, who had been advanced by their father in his lifetime, ought to bring their portions into hotchpot; for if the children are within the statute as to one clause, they must be within it as to every clause thereof.

Sed curia [Sir JOSEPH JEKYLL, M. R.] *contra.* Though this seventh part devised to the son, did, by his dying in his father's lifetime, for necessity's sake become distributable according to the statute, yet I take this not to be in strictness within the same, because here is an executor, and therefore the testator cannot be said to have died intestate, though it is true the executor, being but a trustee, is, by an equitable construction, and by means of an accident that has happened since the making of the will, a trustee for the next of kin according to the statute. However, this is (as I said) merely through necessity, and because no one else can take; but as to children who were advanced in their father's lifetime, bringing such their advancements into hotchpot, that is to be only in the case of a total intestacy, or where the whole personal estate, not where part only, and that perhaps but a very small part (as here), becomes distributable; neither would it be reasonable for the children so to do. And it is observable that Mr. Lutwyche, who was of counsel with the deceased daughter's husband, and whose client's interest it was to have the advancements of the four married daughters brought into hotchpot, gave up the point, saying it had been so adjudged in Sir George Wheeler's Case.[66]

HOLT v. LIBBY.

(Supreme Judicial Court of Maine, 1888. 80 Me. 329, 14 Atl. 201.)

See ante, p. 697, for a report of the case.

In re RATTENBERRY.

RAY v. GRANT.

(Supreme Court of Judicature, Chancery Division. [1906] 1 Ch. 667.)

SWINFEN EADY, J.* The rule is that a legacy to a creditor of an amount equal to or greater than the debt is prima facie to be considered a satisfaction of the debt.

[66] Reported sub nom. Wheeler v. Sheer in Mos. 288, 301 (1730). In In re Roby, Howlett v. Newington, [1908] 1 Ch. 71, the doctrine that, in applying the analogy of the statute of distribution to the case of partial intestacy of the beneficial interest in undisposed of residue, the advances made by the testator in his life time need not be brought into hotchpot was reaffirmed. Though the decision was unanimous, Fletcher Moulton, L. J., concurred "somewhat reluctantly."

* The statement of facts is omitted.

This rule was established two centuries ago; but no sooner was it established than it was frequently disapproved of, and exceptions were engrafted upon it. In In re Horlock, [1895] 1 Ch. 516, 522, Stirling, J., said that he joined with the many judges who had disapproved the rule laid down, and that he equally disapproved of the exceptions which had been grafted on it, but that both were binding upon him; they are both equally binding upon me. The present case is in my opinion within the rule, unless there is sufficient indication of intention to exclude it.

The debt was £150 money borrowed by the testatrix in 1899 from her sister, the plaintiff, upon which the testatrix paid interest at 5 per cent. during her life, and it was payable on demand.

The legacy is a general pecuniary legacy of £400 without any time being specified for payment, and without any mention of interest. The will bears date November 23, 1903, and does not contain any direction to pay debts.

It is sought to exclude the rule on the ground that the debt carries interest from the death and the legacy only from one year after the death. But it was decided by Lord Hardwicke in Clark v. Sewell, 3 Atk. 96, 98, that where the legacy is in satisfaction of a debt and no time is fixed for payment of the legacy it carries interest from the death of the testator. If the will mentions a date for payment, then interest will only run from that date; and this was the ground upon which Haynes v. Mico, 1 Bro. C. C. 129, and Adams v. Lavender (1824) 1 McCl. & Y. 41, were decided, as pointed out by Stirling, J. Indeed, in Clark v. Sewell, 3 Atk. 96, 97, Lord Hardwicke said: "According to the rule of this court, a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator; for the debt, whether of a principal sum or for interest, is due at the death of the testator, and therefore the legacy must be so too. * * * There is no case to make a legacy a satisfaction of a debt, where the legacy is not due at the time of the testator's death, but is made contingent, and to take place at a future day, * * * whether the postponing the legacy is a month only or a longer time, it makes no manner of difference." Lord Hardwicke, in referring to a legacy that "must take place immediately after the death of the testator," means a legacy the payment of which is not postponed by the testator. A legacy is within the rule laid down by Lord Hardwicke if it is an immediate legacy, although, of course, only payable in a due course of administration and after debts and funeral expenses have been provided for.

In Fowler v. Fowler, 3 P. Wms. 353, where the debt due at the date of the will was £200, for arrears of pin money, and a general pecuniary legacy of £500 was given, Talbot, L. C., held that the legacy was a satisfaction of the debt. In Gaynon v. Wood, 1 Dick. 331, there was a bond debt of £200 and a legacy of £500 given to the creditor by a subsequent codicil, and the Master of the Rolls held that the legacy must be taken in satisfaction of the debt, and the fact that since the

death the executors had paid the bond debt to the creditor made no difference in adjusting the rights of the parties.

So, again, In re Fletcher, 38 Ch. D. 373, 376, before North, J., is an instance of a legacy being given in satisfaction of a debt, where the debt carried interest, and where no time was fixed for payment of the legacy. In that case the debt was in fact paid off by the testator in his lifetime, and the actual decision was that the legacy had been adeemed, but the learned judge first considered how the matter would have stood if the debt had not been so paid off. He said: "Suppose the debt had not been paid, could the widow have taken the debt as well as the legacy? I think clearly not." The fact, therefore, that the legacy is given generally, without any reference to time of payment or interest, will not exclude the rule.

Reliance was also placed on the fact that the plaintiff was appointed executrix and could retain her own debt, but in my opinion this makes no difference. As I have already pointed out, in the case of Gaynon v. Wood, 1 Dick. 331, the debt had been actually paid by the executor. I am therefore bound by the authorities to which I have referred to hold that in the present case the legacy is a satisfaction of the debt.

The distinctions between the cases on the satisfaction of debts by annuities are very slender, as may be seen by comparing Atkinson v. Littlewood, L. R. 18 Eq. 595, before Malins, V. C., and In re Dowse, 50 L. J. Ch. 285, before Hall, V. C., which latter case was followed by Stirling, J., in In re Horlock (1895) 1 Ch. 516; but it is by the decisions on cases of legacies, which leave no room for doubt, that the present case is governed.[67]

[67] "A legacy by a debtor to a creditor will, in the absence of any evidence of the testator's intent, be presumed to have been given in payment of the debt, if the debt was contracted prior to the making of the will, and the legacy is as great or greater than the debt. The rule seems to have little or no foundation in reason, and is followed with reluctance. It does not apply where a debt turns out to be due on an account current, nor where the legacy is uncertain or contingent, or if there is an express direction to pay debts, or if there is a difference in the nature of the debt and legacy, or in the times in which they are respectively payable, or where the legacy is payable upon terms less advantageous to the creditor, or where the debt accrued after the making of the will, or where the property devised is of uncertain value, or where the expressed purpose of the gift, strictly construed, would not include a debt due from the testator." Gardner on Wills, p. 571. See, also, note to Holt v. Libby, reported ante, p. 697.

"In a case of ademption, where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator when he makes his will is under a liability which he cannot revoke or avoid. He can only put an end to it by payment or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is therefore easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation." Cotton, L. J., in In re Tussand, 9 Ch. D. 363, 380 (1878).

In Sharp v. Wightman, 205 Pa. 285, 54 Atl. 888 (1903), it was held that, in case the testator's intention is left in doubt by the will, evidence outside the will may be received to show whether the testator intended a legacy to his son to be an extinguishment of the latter's indebtedness.

In re BRUCE.

LAWFORD v. BRUCE.

(Supreme Court of Judicature, Court of Appeal. [1908] 2 Ch. 682.)

Appeal from a decision of Neville, J., [1908] 1 Ch. 850.

The testator, who died in 1882, devised and bequeathed his real and residuary personal estate to trustees upon trust (in the events which happened) for his widow for life, and after her death upon trust for his seven children in equal shares. James Bruce was one of these children.

In 1906 the testator's widow died. Some old papers of the testator's were then found, from which it appeared that in the year 1878 he had lent his sister, one Emily Gordon, £200 at 5 per cent. interest, and that no payment or acknowledgment in respect of either principal or interest had been made since 1880.

The said Emily Gordon had died in 1903, having bequeathed the residue of her personal estate to the said James Bruce and having appointed him one of her executors. The said Emily Gordon's will had been proved by both executors, her estate had been wound up, and James Bruce had received the residue of her personal estate, which amounted to about £5,000.

The plaintiffs, the present trustees of the testator, had distributed and paid over his residuary estate, other than the one-seventh share payable to the said James Bruce, which amounted to about £1,700.

The present summons was taken out by the trustees for the purpose of determining whether or not the said James Bruce was bound to bring the £200 debt with interest from 1880 into account against his one-seventh share of the testator's estate.

Neville, J., held that the principle of Courtenay v. Williams, 3 Hare, 539, on appeal, 15 L. J. Ch. 204, applied, and that James Bruce must bring the debt and interest into account against his share in his father's residuary estate.

James Bruce appealed.

Cozens-Hardy, M. R.[68] In this case I am unable to agree with the decision at which Neville, J., has arrived. The material facts are very simple. [His Lordship stated them, and continued:] The claim which is raised in the action is this: "You, James Bruce, are not entitled to be paid in full your share of your father's estate, because you must deduct from that share the amount of the statute-barred debt which was due from Emily Gordon and from her executors after her death." It is sought to support that view by reference to the well-known decision in Courtenay v. Williams, 3 Hare, 539, 15 L. J. Ch. 204.

First of all, what was Courtenay v. Williams? It was a case in

[68] The concurring opinions of Fletcher Moulton, L. J., and of Farwell, L. J., are omitted.

which the legatee under the will was directly and legally a debtor of the testator's estate. True, the statute of limitations had barred the remedy, but the legal liability remained, and could be enforced in various ways which are indicated by the court, e. g., a lien on any moneys she could get hold of later on, and the court there said, "You cannot claim payment in full of the assets because you, in respect of your legal liability, must be regarded as having an asset of the estate in your hands for which you must account," or, in other words, you must be considered, to the extent of those assets, to have paid yourself. Neville, J., in his judgment treated it in this way. He said: "It seems to me that the trustees of the testator's estate are entitled to say to him, 'You have in your hands, as residuary legatee of your aunt, this debt which with interest has remained due from her and has never been paid to the testator's estate and ought to be accounted for.' "

I am entirely unable to follow that. There was at no time the legal relation of debtor and creditor between James Bruce as residuary legatee and the testator. It is quite true there might have been, apart from the statute of limitations, a right in the creditor to follow the assets in the hands of the residuary legatee, but that right has been plainly lost by the statute of limitations, and, there being no possibility of bringing an action in equity against James Bruce, I fail to see any foundation for the doctrine which is relied upon. No part of Emily Gordon's assets has been appropriated or has been retained in respect of this debt, and there is no foundation, as it seems to me, for the suggestion that James Bruce, in his character of residuary legatee, ever was liable, in the sense of being equitably liable, to pay this debt. There was no legal liability, and a court of equity always considers that it must regard all the circumstances of the case; it considers the question of laches and all such matters before it makes an order to refund and do what is just and right between the parties. In the present case, I can scarcely bring myself to doubt that this is a case in which those equitable considerations ought to have been applied, if the court had been asked to follow assets in this case. But this is not a case of following assets at all. There was never any time when there was any legal liability, and the whole foundation of Courtenay v. Williams, 3 Hare, 539, 15 L. J. Ch. 204, was that there was a legal liability.

With great respect to the learned judge, I think his decision was wrong and that this appeal must be allowed.

APPENDIX

ENGLISH STATUTES

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St. 13 Edw. I (Westm. II) c. 19 (1285).—Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; (2) the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

St. 13 Edw. I (Westm. II, 1285) c. 23.—Executors from henceforth shall have a writ of accompt and the same action and process in the same writ as the testator might have had if he had lived.

St. 4 Edw. III, c. 7 (1330).—Item, Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; (2) it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner, as they, whose executors they be, should have had if they were in life.

St. 25 Edw. III, c. 5 (1350).—Item, it is accorded and established that executors of executors shall have actions of debts, accompts and of goods carried away of the first testators; (2) and execution of statutes merchants and recognizances made in court of record to the first testator, in the same manner as the first testator should have had if he were in life, as well of actions of the time past as of the time to

come, in all cases where judgment is not yet given betwixt such executors; (3) but that the judgments given to the contrary to this article in times past shall stand in their force; (4) and that the same executors of executors shall answer to other of as much as they have recovered of the goods of the first testators, as the first executors should do if they were in full life.

St. 31 Edw. III, c. 11 (1357).—Item, it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; (2) which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the king's court, for to administer and dispend for the soul of the dead; (3) and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as of the time to come.

St. 21 Hen. VIII, c. 5, §§ 3, 4 (1529).—III * * * (6) And in case any person die intestate, or that the executors named in any such testament refuse to prove the said testament, then the said ordinary, or other person or persons having authority to take probate of testaments, as is abovesaid, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them, to whom shall be made such commission, for the true administration of the goods, chattels, and debts, which he or they shall be so authorized to minister; (7) and in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making request, where divers do require the administration.

IV. Or where but one or more of them, and not all being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request, or any one of them at his pleasure. * * *

Sts. 32 Hen. VIII, c. 1 (1540), and 34 & 35 Hen. VIII, c. 5 (1542). —See extracts, ante, p. 112.[1]

St. 12 Car. II, c. 24 (1660). * * * And it is hereby enacted * * * that all tenures by knight-service of the king, or of any oth-

[1] As the Statutes of Wills are sufficiently stated ante, p. 112, and their effect explained in the passages ante, pp. 3, 5, and as, if printed in full, they would occupy too much space, they are omitted.

er person, and by knight-service *in capite,* and by socage *in capite* of the king, and the fruits and consequents thereof, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged. * * * And all tenures of any honours, manors, lands, tenements or hereditaments, of any estate of inheritance at the common law, held either of the king or of any other person or persons, bodies politick or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes, * * * and shall be so construed, adjudged and deemed to be from the said twenty-fourth day of February, one thousand six hundred forty-five, and forever thereafter, turned into free and common socage; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.[2]

St. 22 & 23 Car. II, c. 10 (1671). *An Act for the better settling of intestates' estates.* Be it enacted by the king's most excellent majesty, with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the first day of June one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis,* viz.:—

II. The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of ——— court, at or before the ——— day of ——— next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration,

[2] A part of § 1 only of the statute is here given. The effect of the statute is explained in the passages, ante, pp. 3, 5, 6.

at or before the ——— day of ———. And all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint. (4) And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

III. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice; (2) and also that the said ordinaries and judges respectively, shall and may, and are enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate; (3) and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funerals and just expenses of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his Majesty's ecclesiastical laws: (4) saving to every one, supposing him or themselves aggrieved, right of appeal as was always in such cases used.

IV. Provided, that this Act, or anything herein contained, shall not anyways prejudice or hinder the customs observed within the city of London or within the province of York or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; anything herein contained to the contrary notwithstanding.

V. Provided always, and be it enacted by the authority aforesaid, that all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, (2) one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the

said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: (3) and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: (4) but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate.

VI. And in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them.

VII. Provided, that there be no representatives admitted among collaterals after brothers' and sisters' children; (2) and in case there be no wife, then all the said estate to be distributed equally to and amongst the children; (3) and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

VIII. Provided also, and be it likewise enacted by the authority aforesaid, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death; (2) and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing to the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear; that then and in every such case he or she shall respectively refund and pay back to the administrator his or her ratable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.

IX. Provided always, and be it enacted by the authority aforesaid, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo,* he shall continue so to do, and

the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made.[3]

St. 29 Car. II, c. 3 (1676).—V. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burned, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following: (2) Be it further enacted by the authority aforesaid, That from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIX. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury: (2) Be it enacted by the authority aforesaid, That from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of

[3] See section 25 of St. 29 Car. II, c. 3 (1676), post, p. 759, and St. 1 Jac. II, c. 17, § 7 (1685), post, p. 760.

thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, That no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And be it further enacted: That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always: That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveable, wages and personal estate, as he or they might have done before the making of this act.

XXIV. And it is hereby declared: That nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this act.

XXV. And for the explaining one act of this present Parliament, intituled, *An act for the better settling of intestates estates* [22 & 23 Car. II, c. 10]: (2) Be it declared by the authority aforesaid: That neither the said act, nor any thing therein contained, shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that

their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

St 1 Jac. II, c. 17, § 7 (1685).—Provided also, and it is further enacted by the authority aforesaid, that if after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her; anything in the last-mentioned acts to the contrary notwithstanding.

St. 25 Geo. II, c. 6 (1752).—See the passage from Blackstone, quoted ante, pp. 186, 187.

St. 7 Wm. IV & 1 Vict. c. 26 (1837).—Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same: That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service, and Purveyance, and for settling a revenue upon His Majesty in lieu thereof,* or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service,* and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his land;* and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The Bill concerning the Explanation of Wills;* and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;* and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled *An Act for Prevention of Frauds and Perjuries,* and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled *An Act for Prevention of Frauds and Perjuries,* as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate, *pur autre vie,* or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better Advancement of Justice,* and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An Act for the Amendment of the Law, and the better Advancement of Justice,* as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled *An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries,"* as relates to estates *pur autre vie;* and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled *An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America,* except so far as relates to His Majesty's Colonies and Plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;* and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will,* shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively re-

late to any wills or estates *pur autre vie,* to which this Act does not extend.

III. And be it further enacted: That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie,* whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

IV–V. [Relating to customary and copyhold estates.]

VI. And be it further enacted, That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie,* whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and

whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

IX. And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of His Majesty King George the Fourth and the first year of the reign of His late Majesty King William the Fourth, intituled *An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy,* respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of service in Her Majesty's navy.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof,

or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distribution).

XIX. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of

the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXV. And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed, to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise; Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real

estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIII. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, That this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January one thousand eight hundred and thirty-eight.

XXXV. And be it further enacted, That this Act shall not extend to Scotland.

St. 15 & 16 Vict. c. 24.—See ante, p. 114.

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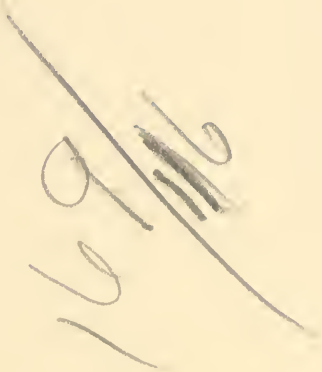

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